No. 4053

1355 1355

# United States

# Circuit Court of Appeals

## For the Ninth Circuit.

JANG DAO THEUNG,

Appellant,

vs.

JOHN D. NAGLE, as Commissioner of Immigration for the Port of San Francisco,

Appellee.

# Transcript of Record.

**Upon Appeal from the Southern Division of the United States District Court for the Northern District of California, First Division.**

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]


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**Names of Attorneys of Record.**

For Petitioner and Appellant:

GEO. A. McGOWAN, Esq., and JOHN L. McNAB, Esq., San Francisco, California.

For Respondent and Appellant:

UNITED STATES ATTORNEY, S. F., Calif.

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In the Southern Division of the United States District Court in and for the Northern District of California: Second Division.

No. 17817.

In the Matter of JANG DAO THEUNG On Habeas Corpus.

**Praecipe for Transcript on Appeal.**

To the Clerk of said Court:

Sir: Please make transcript of appeal in the above-entitled case, to be composed of the following papers, to wit:

1. Petition for writ.
2. Amended order to show cause.
3. Demurrer.
4. Minute order introducing immigration record at the hearing of demurrer.
5. Judgment and order denying petition.
6. Notice of appeal.
7. Petition for appeal.
8. Assignment of errors.
9. Order allowing appeal.

10. Citation on appeal.
11. Stipulation on order respecting immigration record.
12. Clerk's certificate.

GEO. A. McGOWAN,
JOHN L. McNAB,
Attorneys for Petitioner.

Service of the within praecipe, and receipt of a copy thereof, is hereby admitted this 6th day of June, 1923.

JOHN T. WILLIAMS,
U. S. Attorney.

[Endorsed]. Filed Jun. 6, 1923. Walter B. Maling, Clerk. By C. M. Taylor, Deputy Clerk. [1*]

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In the Southern Division of the United States District Court in and for the Northern District of California: Second Division.

No. 17817.

In the Matter of JANG DAO THEUNG On Habeas Corpus.

(21405/7–24. Ex. SS. "Nanking," September 12, 1922.)

**Petition for Writ.**

To the Honorable, United States District Judge, now presiding in the United States District Court, in and for the Northern District of California, Second Division:

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*Page-number appearing at foot of page of original certified Transcript of Record.

It is respectfully shown by the petition of the undersigned that Jang Dao Theung, hereafter in this petition referred to as "the detained," is unlawfully imprisoned, detained, confined and restrained of his liberty by John D. Nagle, Commissioner of Immigration for the Port of San Francisco, at the Immigration Station at Angel Island, county of Marin, State and Northern District of California, Southern Division thereof; that the said imprisonment, detention, confinement and restraint are illegal and that the illegality thereof consists in this, to wit:

That it is claimed by the said Commissioner that the said detained is a Chinese person and alien not subject or entitled to admission into the United States under the terms and provisions of the Acts of Congress of May 6th, 1882; July 5th, 1884; November 3d, 1893, and April 29th, 1902, as amended and re-enacted by Section 5 of the Deficiency Act of April 7th, 1904, which said acts are commonly known and referred to as the Chinese Exclusion or Restriction Acts; and that he, the said Commissioner intends to deport the said detained away from and out of the United States to the Republic of China.

That the said Commissioner claims that the said detained arrived at the port of San Francisco on or about the 12th day of September, 1922, on the SS. "Nankin," and thereupon made application [2] to enter the United States as the minor son of a resident Chinese merchant lawfully domiciled within the United States of America, and that the application of the said detained to enter the United

States upon said grounds was denied by the said Commissioner of Immigration, and that an appeal was thereupon taken from the excluding decision of the said Commissioner of Immigration to the Secretary of Labor, and that the said Secretary thereafter dismissed the said appeal; that it is admitted by the Commissioner of Immigration that the said detained was admissible into the United States under the Acts of Congress approved Feb. 5, 1917, commonly known as the General Immigration Laws; that it is claimed by the said Commissioner that in all of the proceedings had herein the said detained was accorded a full and fair hearing, that the action of the said commissioner and the said Secretary was taken and made by them in the proper exercise of the discretion committed to them by the statute in such cases made and provided, and in accordance with the regulations promulgated under the authority contained in said statutes.

But, on the contrary, your petitioner alleges, on his information and belief, that the hearing and proceedings had herein, and the action of the said Commissioner and the action of the said Secretary was and is in excess of the attorney committed to them by the said rules and regulations and by the said statute, and that the denial of the said application of the said detained to enter the United States as the minor son of a resident Chinese merchant lawfully domiciled within the United States was and is an abuse of the authority committed to them by the said statutes in each of the particulars as

hereinafter, and beginning on page 4 of this petition, set forth.

Your petitioner alleges, upon his information and belief, that it is admitted and conceded by the said Commissioner and the said Secretary of Labor, that Jang Sing, otherwise known as Jang Wey Ming, the person claiming to be the father of this [3] applicant, the detained herein, is a resident Chinese merchant lawfully domiciled within the United States, and that he is a member of Sue Sing Lung Company, a firm engaged in buying and selling merchandise at a fixed place of business at Fowler, California, and that he has been such a merchant for more than year prior to the application of the said detained to enter the United States, and that evidence of said facts, as required by law, has been given to the complete satisfaction of the said Commissioner and the said Secretary. It is further found and conceded to be a fact that the said detained is a minor, i. e., a person under the age of 21 years. It is further contended that the denial by the said Commissioner of the application of the detained to enter the United States was caused by the alleged disbelief in the existence of the relationship of father and son between the detained and the said Jang Sing, the person claiming to be his father, and the denial of the said Secretary of Labor of the appeal from the said excluding decision is likewise contended to be based upon said reason alone. It is further conceded that the evidence attesting the mercantile status of the said father was established by the testimony of two credible

witnesses other than Chinese, whose testimony further established the fact that during the said period of one year the said father had engaged in the performance of no manual labor of any kind or description save and excepting such as was incumbent upon him in the conduct of his said business as such merchant, and also established to the complete satisfaction of the said Commissioner and the said Secretary of Labor that the said father was a merchant as that term is defined in the said Chinese Exclusion Laws. Your petition hereinafter sets forth the allegations of unfairness in said hearing.

I.

Your petitioner alleges, upon his information and belief, that the hearing had in said matter before the said Commissioner and the said Secretary upon the questions of the claimed relationship [4] of father and son was unfair and prejudicial to the rights of the said detained and prevented him from having a full and fair opportunity to present the evidence in support of his application to enter the United States as such merchant's minor son, and also prevented and deprived him from having said evidence accorded the weight and recognition to which it was by law entitled. In this connection your petitioner alleges, upon his information and belief, that the evidence given in support of the application of the detained to enter the United States as such merchant's minor son was of such a conclusive kind and character that to refuse to be guided thereby, and to find contrary thereto,

was an abuse of the official discretion vested in the said Commissioner and the said Secretary, and has deprived and prevented this detained from a fair hearing and determination of his right to enter the United States, and that he is for said reason deprived of his liberty without due process of law.

II.

Your petitioner alleges, upon his information and belief, that the denial by the said Commissioner of the application of the detained to enter the United States, made and entered herein was had and based upon the assumed fact that Jang Sing, the father of the said detained, had testified on November 18, 1911, that he was not married and had never been married, which statement conflicted with and was at variance with his testimony in the then application of the detained to enter the United States, the father having at the time in question been married and the father of this detained, but in this connection your petitioner alleges that the said father of the said detained was not confronted with said statement, nor was he given any opportunity to admit or deny the same, or make any explanation with respect thereto, all in violation of the instructions from the Department at Washington posted upon the bulletin board at Angel Island for the information and guidance of all interested therein and, among others, the attorney for this detained, [5] wherein the examining officers were admonished and directed that in all such instances the witnesses should be con-

fronted with such prior declarations and statements and be given an opportunity to make their explanations thereto and to submit evidence to overcome said prior adverse statement, but no such opportunity was given the father of this detained, and the application of the said detained to enter the United States was denied solely because of said prior adverse declaration without according the detained any opportunity to be heard thereon, and your petitioner alleges that had the father been confronted with said prior adverse declaration he could have testified and would have presented witnesses and overwhelming evidence which would have conclusively established the fact that he, the said father, was married and was the father of the said detained at the time of making said prior adverse declaration, and would have reasonably and feasibly explained the same to the complete and entire satisfaction of the said Commissioner and the said Secretary, and that the failure of the said immigration officials to so confront the father with the said prior adverse declaration has prevented and deprived him from being heard upon this the pivotal and crucial point in the matter of the said detained to enter the United States, and that for said reason this detained is deprived of his liberty without due process of law.

III.

Your petitioner alleges, upon his information and belief, that after the said denial of the application of the detained to enter the United States there was presented before the Secretary of Labor

at Washington the joint affidavit of Jang Lou Wong, otherwise known as Sam Yick, and his wife Lee Jen, the affidavit of Wong Wing Sing, and the affidavit of Hong Gong Chong, which affidavits positively establish the fact that the father of the said detained was married and was the father of this detained, all as claimed by the said father in his examination herein, and also positively established the fact that at the time the [6] father stated he was not married, he was, in fact, married and was the father of this detained, all as more particularly and in detail set forth and contained in said affidavits; but that the said Secretary of Labor refused to examine or take the testimony of said witnesses, and refused to re-examine or confront the father with the said prior adverse declaration, and refused to give him any opportunity to explain the same, and thereupon dismissed the said appeal and denied the application of the said detained to enter the United States, and that the action of the said Secretary in refusing to take, hear and receive the testimony of the said additional witnesses, and in refusing to afford the father of the said detained the opportunity to be heard upon and in explanation of said prior adverse declaration, acted in an arbitrary manner and prevented the detained from submitting evidence upon his own behalf which would have conclusively established the fact that the said detained is, and was, the minor son of a resident Chinese merchant lawfully domiciled within the United States and hence would have rendered the said

detained admissible thereto, and because of said action of the said Secretary the said detained is deprived of his liberty without due process of law, he having been denied and deprived of a full and fair opportunity to present evidence upon his own behalf, and also having been denied and deprived of a fair hearing of his application to enter the United States.

IV.

Your petitioner alleges, upon his information and belief, that after the dismissal of the appeal of the said detained by the Secretary of Labor there was filed with the said Secretary a petition for a rehearing and a strong demand that the testimony of the additional witnesses who had been proffered, and whose affidavits had been filed, be taken, and that the said witnesses be examined, and that the father be re-examined touching the said prior declaration, and calling attention of the said secretary to the fact that this Honorable Court had shortly theretofore [7] held in the *habeas corpus* case of Low Joe, No. 17,673, that the administrative hearing and the decision of the said Secretary of Labor had been unfair because of the failure to examine witnesses and refusing to receive testimony as requested by counsel; and your petitioner alleges, upon his information and belief, that after considerable delay a rehearing in said case was directed by the said Secretary, the said detained assuming that the said rehearing had been granted because of a belief in the mind of the said Secretary that his former decision was erroneous and that

the applicant had been denied a fair hearing, and so believing, the said detained did not then and there prosecute his application for a writ of habeas corpus, as he was by law entitled to do, but accepted said hearing; that thereafter the said additional examination was fully and fairly conducted and held and that the said witnesses were fully heard upon the said matters in dispute by Immigration Inspector Moore at Fresno, California, on or about the 29th day of January, 1923, but immediately thereafter said application to land was denied by the said Commissioner, and on appeal taken therefrom the attorney for the detained had access to the immigration record, and then for the first time found and discovered that said rehearing had been directed, according to the information and belief of your petitioner, not because of any conception or belief of injustice in the mind or judgment of the said Secretary in the prior proceeding had herein, but because of the following holding of the said Secretary with respect thereto:

> "The record contains the affidavit of two persons who claim to have a knowledge on the essential facts. These affidavits were considered when the case was previously before the Board of Review, and the conclusion was reached that it would be unnecessary to delay disposing of the case until the testimony of the affiants could be taken, provided the affidavits were considered as embodying substantially what the affiants would testify to. Counsel also pointed out in his brief that the immigra-

tion officials, in examining the alleged father, had failed to question him regarding his testimony of 1911, during the course of which he made statements inconsistent with the claims of paternity now advanced. This point likewise was not regarded as of sufficient importance to call for the return of the record to San Francisco." [8]

Your petitioner alleges, upon his information and belief, that the real reason why the said Secretary ordered a reopening in this case was to prevent the detained from applying for a writ of habeas corpus and having the issues tried before this Court upon the merits, all as disclosed in the concluding portion of the order of the said Secretary, which is as follows:

"Counsel has invited the attention of the Board of Review to a recent decision of the District Court at San Francisco in the case of a Chinese named Low Joe, whose exclusion was directed by the Department. In that case in which there were numerous material discrepancies, the Department directed reopening after one writ of habeas corpus had been dismissed, for the purpose of receiving additional evidence. The examining officers at Angel Island during the course of supplemental hearing in the Low Joe case, failed to examine him regarding the discrepancies in the record as it was originally made up, and the court held this to be unfair. This impresses the Board of Review as somewhat remarkable, but the

United States Attorney at San Francisco does not believe an appeal to be advisable, and it is, therefore, likely that the District Court, if the case of Jang Dao Theung were to come before it, would, reasoning along lines similar to the Low Joe case, hold this hearing also to be unfair, because the alleged father was not questioned regarding his 1911 testimony. For this reason it would seem to be advisable to reopen the case, and as long as delay is now inevitable there is no real reason for not also taking the testimony of the additional witness. The Board of Review recommends that the case be reopened in order that the testimony of the additional witnesses may be taken, and also, in order that the father may have an opportunity to submit such explanation as he may be advised of his 1911 statements."

Your petitioner alleges that the action of the said Commissioner in again denying the application of the detained to enter the United States and the action of the said Secretary in dismissing the appeal taken from the excluding decision of the said Secretary was an abuse of the discretion vested in them in this, that your petitioner alleges, upon his information and belief, that the evidence and testimony presented at said rehearing was so positive and conclusive attesting the right of the applicant to be admitted into the United States as the minor son of a resident Chinese merchant lawfully domiciled therein, that said evidence was so clear and convincing and so positive that the said Commis-

sioner and the said Secretary acted unreasonably and arbitrarily in rejecting it, and that they acted under fundamentally incorrect assumptions of law in so doing; the [9] reasonableness of said evidence was so positive and conclusive in its character and its nature that to refuse to be guided thereby and in accordance therewith was, your petitioner alleges, upon his information and belief, an abuse of the official discretion vested in the said Commissioner and the said Secretary.

V.

Your petitioner alleges, upon his information and belief, that the said Commisioner and the said Secretary, have acted under fundamentally incorrect assumptions of law in weighing and considering the evidence presented upon behalf of the said detained and in discrediting the said evidence and denying the application of the detained to enter the United States, and in this particular, and in this regard, your petitioner alleges, upon his information and belief, that there being alleged to exist a prior declaration of the father that he was not married made at a time when, according to the testimony and the evidence given in support of the application of the detained to enter the United States the father was, in fact, married and the father of this detained, that the said officials, and each of them, have considered the said prior adverse declaration as an absolute bar to the existence of the relationship herein claimed, and have accepted and considered the said prior adverse declaration or statement as absolutely controlling and precluding the existence

of the relationship of father and son between the said detained and his father, and while accepting evidence in explanation and contradiction of the said prior adverse declaration the said officials have refused, according to the information and belief of your petitioner, to consider and weigh said evidence, or accorded the weight and legal effect which it is entitled to by law, or to accord to it any weight whatsoever but, on the contrary, have considered said prior declaration as absolutely controlling and a bar to the favorable consideration upon any evidence given to the contrary, and because of said fundamental incorrect assumption of law the detained has been prevented and deprived of a [10] fair hearing and a fair consideration of his application to enter the United States and is, for said reason, deprived of his liberty without due process of law.

That your petitioner has not in his possession any part or parts of the said proceedings (except as herein set forth) had before the said Commissioner and the said Secretary, that the parts of said proceedings formerly in the possession of your petitioner were forwarded to Washington for use by the attorney for the detained pending the appeal before the said Secretary, and the said adverse decision of the said Secretary having been transmitted by telegraph the said copy is now in the mails between Washington and San Francisco, and it is for said reason impossible for your petitioner to annex hereto any part or parts of said immigration records; but your petitioner is willing to in-

corporate as part and parcel of his petition, the said immigration record when the same shall have been received from the Secretary of Labor at Washington and shall have it presented to this Court at the hearing to be had hereon.

That it is the intention of the said Commissioner to deport the said detained out of the United States and away from the land of which his father now enjoys a permanent domicile, by the SS. "Nanking," which according to the information and belief of your petitioner, is scheduled to sail from the port of San Francisco on or about April 19, 1923, at about one o'clock P. M. of said day, and unless this Court intervenes to prevent said deportation, the said detained will be deprived of residence within the United States.

That the said detained is in detention, as aforesaid, and for said reason is unable to verify this said petition upon his own behalf and for said reason petition is verified by your petitioner but for and as the act of the said detained, and upon his own behalf.

WHEREFORE, your petitioner prays that a writ of habeas corpus issue herein as prayed for, directed to the said Commissioner of [11] Immigration commanding and directing him to hold the body of the said detained within the jurisdiction of this Court, and to present the body of the said detained before this Court at a time and place to be specified in said order, together with the time and cause of his detention, so that the same may be inquired

into to the end that the said detained may be restored to his liberty and go hence without day.

Dated at San Francisco, California, April 10th, 1923.

JUNG HING.

GEO. A. McGOWAN.

GEO. A. McGOWAN, Esq.,
Attorney for Petitioner,
550 Montgomery Street, San Francisco, Calif.

United States of America,
Southern Division of the Northern
District of the State of California,
City and County of San Francisco,—ss.

The undersigned, being first duly sworn, according to law, doth depose and say:

That your affiant is the petitioner named in the foregoing petition; that the same has been read and explained to him and that he knows the contents thereof; that the same is true of his own knowledge, except as to those matters which are therein stated on his information and belief, and as to those matters he believes it to be true.

JUNG HING.

Subscribed and sworn to before me this 10th day of April, 1923.

[Seal] R. H. JONES,
Notary Public.

[Endorsed]: Filed Apr. 13, 1923. Walter B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [12]

In the Southern Division of the United States District Court in and for the Northern District of California, Second Division.

No. 17817.

In the Matter of JANG DAO THEUNG, on Habeas Corpus. (21405/7–24 Ex SS. "Nanking," September 12, 1922.)

**Amended Order to Show Cause.**

Upon motion of Geo. A. McGowan, Esq., attorney for petitioner, the Order to Show Cause heretofore issued herein on the 13th day of April, 1921, is hereby vacated and set aside, and

GOOD CAUSE APPEARING THEREFOR, and upon reading the verified petition on file herein:

IT IS HEREBY ORDERED that John D. Nagle, Commissioner of Immigration for the port of San Francisco, appear before this Court on the 21st day of April, 1923, at the hour of 10:00 o'clock A. M. of said day, to show cause, if any he has, why a writ of habeas corpus should not be issued herein as prayed for, and that a copy of this order be served upon the said commissioner.

AND IT IS FURTHER ORDERED that the said John D. Nagle, Commissioner of Immigration, as aforesaid, or whoever, acting upon the orders of the said commissioner or the Secretary of Labor, shall have the custody of the said Jang Dao Theung, are hereby ordered and directed to retain the said Jang Dao Theung within the custody of the said

Commissioner of Immigration, and within the jurisdiction of this court until its further order herein.

Dated at San Francisco, California, April 20th, 1923.

JOHN S. PARTRIDGE,
United States District Judge.

[Endorsed]: Filed Apr. 20, 1923. Walter B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [13]

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In the Southern Division of the United States District Court for the Northern District of California, First Division.

No. 17817.

In the Matter of JANG DAO THEUNG, on Habeas Corpus.

**Demurrer to Petition for Writ of Habeas Corpus.**

Comes now the respondent, John D. Nagel, Commissioner of Immigration, at the port of San Francisco, in the Southern Division of the Northern District of California, and demurs to the petition for a writ of habeas corpus in the above-entitled cause and for grounds of demurrer alleges:

I.

That the said petition does not state facts sufficient to entitle petitioner to the issuance of a writ of habeas corpus, or for any relief thereon.

II.

That said petition is insufficient in that the statements therein relative to the record of the testimony

taken on the trial of the said applicant are conclusions of law and not statements of the ultimate facts.

WHEREFORE, respondent prays that the writ of habeas corpus be denied.

JOHN T. WILLIAMS,
United States Attorney,
ALMA M. MYERS,
Asst. United States Attorney,
Attorneys for Respondent.

[Endorsed]: Filed May 19, 1923. Walter B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [14]

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At a stated term of the Southern Division of the United States District Court for the Northern District of California, First Division, held at the courtroom thereof, in the city and county of San Francisco, on Saturday, the 19th day of May, in the year of our Lord one thousand nine hundred and twenty-three. Present: The Honorable JOHN S. PARTRIDGE, District Judge.

No. 17,817.

In the Matter of JANG DAO THEUNG, on Habeas Corpus.

**Minutes of Court—May 19, 1923—(Order Sustaining Demurrer and Denying Petition for Writ).**

This matter came on regularly this day for hearing on order to show cause as to the issuance of a writ of habeas corpus herein. Geo. A. McGowan,

Esq., was present as attorney for petitioner and detained. Miss Alma M. Meyers, Asst. U. S. Atty., was present for and on behalf of respondent, and filed demurrer to petition, and all parties consenting thereto, it is ordered that the Immigration Records be filed as Respondent's Exhibits "A," "B," "C," "D," "E" and "F" and that the same be considered as part of original petition. After argument by the respective attorneys, the Court ordered that said matter be and the same is hereby submitted. After due consideration had thereon, the Court ordered that said demurrer to petition for writ of habeas corpus be and the same is hereby sustained, the petition for writ of habeas corpus denied and order to show cause discharged.

On motion of Mr. McGowan, further ordered execution of deportation stayed for period of ten (10) days. [15]

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In the Southern Division of the United States District Court in and for the Northern District of California, Second Division.

No. 17,817.

In the Matter of JANG DAO THEUNG on Habeas Corpus.

**Notice of Appeal.**

To the Clerk of the Above-entitled Court and to the Honorable John T. Williams, United States Attorney for the Northern District of California:

You, and each of you, will please take notice that

Jang Dao Theung, the petitioner and the detained above named, does hereby appeal to the Circuit Court of Appeals of the United States for the Ninth Circuit thereof, from the order and judgment made and entered herein on the 19th day of May, 1923, sustaining the demurrer to and in denying the petition for a writ of habeas corpus filed herein.

Dated at San Francisco, California, June 5th, 1923.

GEO. A. McGOWAN,
JOHN L. McNAB,
Attorneys for Petitioner and Appellant Herein.

[16]

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In the Southern Division of the United States District Court in and for the Northern District of California, Second Division.

No. 17,817.

In the Matter of JANG DAO THEUNG on Habeas Corpus.

**Petition for Appeal.**

Now comes Jang Dao Theung, the petitioner, the detained, and the appellant herein, and says:

That on the 19th day of May, 1923, the above-entitled Court made and entered its order denying the petition for a writ of habeas corpus, as prayed for, on file herein, in which said order in the above-entitled cause certain errors were made to the prejudice of the appellant herein, all of which will

more fully appear from the assignment of errors filed herewith.

WHEREFORE, this appellant prays that an appeal may be granted in his behalf to the Circuit Court of Appeals of the United States, for the Ninth Circuit thereof, for the correction of the errors so complained of, and further, that a transcript of the record, proceedings and papers in the above-entitled cause, as shown by the praecipe, duly authenticated, may be sent and transmitted to the said United States Circuit Court of Appeals for the Ninth Circuit thereof; and further, that the custody of the said detained be not disturbed during the further proceedings to be had herein and until the further order of this Court so that the said detained may be rendered available and produced in execution of whatever judgment may be finally entered herein.

Dated at San Francisco, California, June 5th, 1923.

GEO. A. McGOWAN,
JOHN L. McNAB,

Attorneys for Petitioner and Appellant Herein.

[17]

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In the Southern Division of the United States District Court in and for the Northern District of California, Second Division.

No. 17,817.

In the Matter of JANG DAO THEUNG on Habeas Corpus.

**Assignment of Errors.**

Comes now Jang Dao Theung, by his attorneys, Geo. A. McGowan and John L. McNab, in connection with his petition for an appeal herein, assigns the following errors which he avers occurred upon the trial or hearing of the above-entitled cause, and upon which he will rely, upon appeal to the Circuit Court of Appeals, for the Ninth Circuit, to wit:

First. That the Court erred in dismissing the writ, and in denying the petition for a writ of habeas corpus herein.

Second. That the Court erred in holding that it has no jurisdiction to issue a writ of habeas corpus as prayed for in the petition herein.

Third. That the Court erred in dismissing the writ and in denying the petition of habeas corpus herein and remanding the petitioner to the custody of the Immigration authorities for deportation.

Fourth. That the Court erred in holding that the allegations contained in the petition herein for a writ of habeas corpus and the facts presented upon the issue made and joined herein were insufficient in law to justify the discharge of the petitioner from custody as prayed for in said petition.

Fifth. That the judgment made and entered herein is contrary to law.

Sixth. That the judgment made and entered herein is not supported by the evidence.

Seventh. That the judgment made and entered herein is contrary to the evidence. [18]

WHEREFORE, the appellant prays that the judgment and order of the Southern Division of the United States District Court for the Northern District of the State of California, Second Division, made and entered herein in the office of the Clerk of the said court on the 19th day of May, 1921, discharging the writ of habeas corpus theretofore issued and in denying the petition for a writ of habeas corpus, be reversed, and that this cause be remitted to the said lower Court with instructions to discharge the said Jang Dao Theung from custody, or grant him a new trial before the lower court, by directing the issuance of the writ of habeas corpus as prayed for in said petition.

Dated at San Francisco, California, June 5th, 1923.

GEO. A. McGOWAN,
JOHN L. McNAB,
Attorneys for Petitioner and Appellant.

Service of the within and receipt of a copy thereof, is hereby admitted this 6th day of June, 1923.

JOHN T. WILLIAMS,
United States Attorney.
ALMA M. MYERS,
Asst. U. S. Atty.

[Endorsed]: Filed Jun. 6, 1923. Walter B. Maling Clerk. By C. M. Taylor, Deputy Clerk. [19]

In the Southern Division of the United States District Court in and for the Northern District of California, Second Division.

No. 17,817.

In the Matter of JANG DAO THEUNG on Habeas Corpus.

**Order Allowing Petition on Appeal.**

On this 6th day of June, 1923, comes Jang Dao Theung, the detained herein, by his attorneys, Geo. A. McGowan, and John L. McNab, and having previously filed herein, did present to this Court, his petition praying for the allowance of an appeal to the United States Circuit Court of Appeals for the Ninth Circuit, intended to be urged and prosecuted by him, and praying also that a transcript of the record and proceedings and papers upon which the judgment herein was rendered, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit, and that such other and further proceedings may be had in the premises as may seem proper.

ON CONSIDERATION WHEREOF, the Court allows the appeal hereby prayed for, and orders execution and remand stayed pending the hearing of the said case in the said United States Circuit Court of Appeals for the Ninth Circuit; and it is further ordered that the respondent herein retain the said detained person within the jurisdiction of this Court, and that he do not depart from the

jurisdiction of this Court, but remain and abide by whatever judgment herein is finally rendered.

Dated at San Francisco, California, June 6th, 1923.

M. T. DOOLING,
United States District Judge.

Service of the within and receipt of a copy thereof, is hereby admitted this 6th day of June, 1923.

JOHN T. WILLIAMS,
United States Attorney.
ALMA M. MYERS,
Asst. U. S. Atty. [20]

[Endorsed]: Filed Jun. 6, 1923. Walter B. Maling, Clerk. By C. M. Taylor, Deputy Clerk. [21]

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In the Southern Division of the United States District Court in and for the Northern District of California, Second Division.

No. 17,817.

In the Matter of JANG DAO THEUNG, on Habeas Corpus.

**Stipulation and Order Re Withdrawal of Immigration Record.**

IT IS HEREBY STIPULATED AND AGREED by and between the attorneys for the petitioner and appellant herein, and the attorney for the respondent and appellee herein, that the original immigration record in evidence and con-

sidered as part and parcel of the petition for a writ of habeas corpus upon hearing the demurrer in the above-entitled matter, may be withdrawn from the files of the clerk of the above-entitled court and filed with the clerk of the United States Circuit Court of Appeals in and for the Ninth Judicial Circuit, there to be considered as part and parcel of the record on appeal in the above-entitled case with the same force and effect as if embodied in the transcript of the record and so certified to by the clerk of this court.

Dated at San Francisco, California, June 6th, 1923.

GEO. A. McGOWAN,
JOHN L. McNAB,
Attorneys for Petitioner and Appellant.
JOHN T. WILLIAMS,
United States Attorney for the Northern District of California. Attorney for Respondent and Appellee. [22]

ORDER.

Upon reading and filing the foregoing stipulation, it is hereby ordered that the said immigration record therein referred to, may be withdrawn from the office of the clerk of this court and filed in the office of the clerk of the United States Circuit Court of Appeals in and for the Ninth Judicial Circuit, said withdrawal to be made at the time the record on appeal herein is certified to by the clerk of this court.

M. T. DOOLING,
United States District Court.

Dated at San Francisco, California, June 7, 1923.

Service of the within stipulation and order and receipt of a copy thereof is hereby admitted this 6th day of June, 1923.

J. T. WILLIAMS,
U. S. Attorney.

[Endorsed]: Filed Jun. 7, 1923. Walter B. Maling, Clerk. By C. M. Taylor, Deputy Clerk. [23]

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**Certificate of Clerk U. S. District Court to Transcript of Record.**

I, Walter B. Maling, Clerk of the District Court of the United States, for the Northern District of California, do hereby certify that the foregoing 23 pages, numbered from 1 to 23 inclusive, contain a full, true and correct transcript of certain records and proceedings in the Matter of Jang Dao Theung, on Habeas Corpus, No. 17,817, as the same now remain on file and of record in this office; said transcript having been prepared pursuant to the praecipe for transcript on appeal (copy of which is embodied herein) and the instructions of the attorney for petitioner and appellant herein.

I further certify that the cost for preparing and certifying the foregoing transcript on appeal is the sum of Nine Dollars and Seventy Cents ($9.70) and that the same has been paid to me by the attorney for appellant herein.

Annexed hereto is the original citation on appeal (page 25).

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court, this 30th day of June, A. D. 1923.

[Seal] WALTER B. MALING,
Clerk.
By C. M. Taylor,
Deputy Clerk. [24]

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**Citation on Appeal.**

United States of America,—ss.

The President of the United States to John D. Nagle, Commissioner of Immigration for the Port of San Francisco, and John T. Williams, United States Attorney for the Northern District of California, His Attorney herein, GREETING:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the city of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to an order allowing an appeal, of record in the Clerk's Office of the United States District Court for the Southern Division of the Northern District of California, Second Division, wherein Jang Dao Theung is appellant, and you are appellee, to show cause, if any there be, why the decree rendered against the said appellant, as in the said order allowing appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorabe MAURICE T. DOOLING, United States District Judge for the Southern Division of the Northern Dist. of California, this 6th day of June, A. D. 1923.

M. T. DOOLING,
United States District Judge.

Service of the within citation and receipt of a copy thereof is hereby admitted this 6th day of June, 1923.

J. T. WILLIAMS,
U. S. Attorney for Appellee.

This is to certify that a copy of the within citation on appeal was lodged with me as the Clerk of this court upon the 6th day of June, 1923.

_____,
Clerk U. S. Dist. Court in and for the Nor. Dist. of Calif., at San Francisco.

[Endorsed]: No. 17,817. United States District Court for the Southern Division of the Northern District of California, Second Division. In re: Jang Dao Theung on Habeas Corpus, Appellant, vs. John D. Nagle, Commissioner of Immigration for the Port of San Francisco, Appellee. Citation on Appeal. Filed Jun. 7, 1923. Walter B. Maling, Clerk. By C. M. Taylor, Deputy Clerk. [25]

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[Endorsed]: No. 4053. United States Circuit Court of Appeals for the Ninth Circuit. Jang Dao Theung, Appellant, vs. John D. Nagle, as Commissioner of Immigration for the Port of San Fran-

cisco, Appellee. Transcript of Record. Upon Appeal from the Southern Division of the United States District Court for the Northern District of California, First Division.

Received July 2, 1923.

F. D. MONCKTON,
Clerk.

Filed July 6, 1923.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

No. 4053

IN THE

# United States Circuit Court of Appeals

For the Ninth Circuit

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JANG DAO THEUNG,

*Appellant,*

vs.

JOHN D. NAGLE as Commissioner of Immigration for the Port of San Francisco,

*Appellee.*

---

## APPELLANT'S OPENING BRIEF.

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GEO. A. McGOWAN,
550 Montgomery Street, San Francisco,
*Attorney for Appellant.*

JOHN L. McNAB,
Nevada Bank Building, San Francisco,
*Attorney for Chinese Six Companies,*
*Of Counsel.*

No. 4053

IN THE

# United States Circuit Court of Appeals

**For the Ninth Circuit**

---

JANG DAO THEUNG,
*Appellant,*

vs.

JOHN D. NAGLE as Commissioner of Immigration for the Port of San Francisco,
*Appellee.*

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## APPELLANT'S OPENING BRIEF.

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### Statement of the Case.

The record presents an appeal from an order and judgment denying the petition for a writ of habeas corpus by which latter proceeding it was sought to relieve the appellant, Jang Dao Theung, of the restraint, detention and imprisonment imposed by the Commissioner of Immigration for the Port of San Francisco, who is the respondent in said action. Jang Sing, otherwise known as Jang Wey Ming, a resident Chinese merchant lawfully domiciled within the United States sought to have admitted into the United States a minor son, Jang Dao Theung, the appellant herein. The case was first heard before the immigration authorities at the

Port of San Francisco, and thereafter by the immigration inspector at Fresno and at Fowler, at which latter mentioned place the father is engaged in business as a merchant. At the conclusion of these examinations the attorney for the Chinese was advised that the Commissioner of Immigration was not satisfied from the evidence presented of the existence of the relationship of father and son. This notice contained the following clause (Exhibit A, p. 38):

> "A period of ten days will be allowed for the introduction of additional evidence, provided notice thereof is filed with this office within five days. Review of the record will not be permitted during the time allowed for the submission of further evidence."

The attorney for the Chinese being unable to inspect the record was unable to ascertain in what particular, or particulars, the evidence already presented was deemed and held to be insufficient. It was apparent from the terms of the notice that the mercantile status of the father, and also the minority of the applicant, were conceded, and that the sole and remaining point at issue was the existence of the relationship. A careful checking of the details with the interested parties brought to light no discrepancy or inconsistency and hence the then attorney stated that he knew of no additional evidence which he had to present, and a final denial was accordingly entered (Exhibit A, p. 41). An appeal was taken from this excluding decision to the Secretary of Labor and in response to the at-

torney's request (Exhibit A, p. 44), he was, for the first time, accorded an inspection of the record, which disclosed that the adverse finding of the Commissioner was based upon two grounds: *first,* that the immigration authorities had failed to verify from their records the trip which the father claimed to have made to China, and upon which he claimed this applicant had been begotten. This trip is usually referred to as the trip essential to establish paternity. The *second* and final ground urged for the denial was what was claimed to be a prior declaration or statement of the father that he had never been married, it being claimed that the declaration in question was made at a time after the period claimed for the birth of this appellant, which prior declaration, if true, would preclude the existence of the relationship of father and son.

The attorney representing the Chinese under date of October 20, 1922 (Exhibit A, p. 46), advised the Commissioner that the father had inadvertently given the wrong date for his departure for China, and also the wrong name under which the trip had been made, the trip to China having actually taken place in 1907 and his return occurring in 1908, the name under which the trip was made being Chin Ah Fook (Jeng Ah Fook). A subsequent search of the immigration records verified the correctness of the additional information supplied, and the existence of the trip essential to paternity was hence established, and even though it had been made under a different name, the father's identity was

established and conceded. Thereupon, upon their own motion, the immigration authorities reopened the case and eliminated their first ground of objection, and again redenied the case, but at this time solely because of the prior adverse declaration as to the father's marital status (Exhibit A, pp. 52 and 55). At this time the present attorney of record herein was associated in this case before the immigration service (Exhibit A. p. 78), and asked that the record in the case be sent to the San Francisco Immigration Office for his inspection, as is customary in such cases. The record, however, had been, upon that day, transmitted to the Secretary of Labor upon appeal so this request could not be complied with.

Contemporaneously with the entire history of this case before the immigration service there were posted upon the bulletin board at Angel Island for the information of attorneys handling immigration cases, and immigration inspectors, certain instructions contained in letters from the department dated September 20, 1919, and October 14, 1919, referring to Department of Labor letters 54697/23, which directed that in all cases wherein it was shown that the father had previously made any declaration or statement as to his marital or family conditions adverse to those claimed under examination, that the father should be confronted with the earlier adverse declaration affecting paternity or relationship and asked whether he had made the same and that he should be given opportunity to, and should

be called upon to make his explanation with respect thereto (for corroboration see letter of court officer P. A. Robbins, Exhibit A, pp. 92-93, and letter of appellant's attorney, Exhibit A, pp. 85 to 91). The existence of this requirement was well-known to the attorneys handling this case, and the fact that the father had not been so confronted with the prior declaration or statement adverse to paternity, and had not been asked for any explanation with respect thereto misled the appellant's attorneys in that regard and convinced them that no such point existed in this case, as they had a right to assume that the department's instructions in that regard should have been, and were, complied with. The importance of this point cannot be over-estimated, because had the instructions been complied with the attorneys would have known of the existence of this prior statement, and would have had ample opportunity to present their evidence before the local immigration service had entered its final denial, thus closing the case for the reception of additional evidence. When the additional evidence was gathered and presented one of the reasons assigned for its rejection and denying the contents of the affidavits the full force and effect to which they were entitled, was the fact that the additional evidence in question should have been presented between the preliminary denial (Exhibit A, p. 38), and the entry of the final denial (Exhibit A, p. 41) after which, of course, the case was closed for the reception of additional evidence. It is because the instructions of the depart-

ment, which were posted in a public manner for the instruction, enlightenment and guidance of attorneys practicing before the Angel Island immigration office as well as for the instruction of the immigration officers themselves, were not followed by the latter, which includes not only examining inspector Moore at Fowler and Fresno, but inspector Mayerson and the Commissioner and Assistant Commissioner of Immigration at San Francisco, whose duty and obligation it was to see that these public instructions were followed and complied with, before the case had been finally disposed of, that vital and irreparable injury was done this appellant. The only time and opportunity he had to overcome this act of negligence upon the part of these various officers was after final entry of denial which, of course, was after the case had been closed for the reception of additional evidence. One of the reasons for the rejection of this testimony by the Secretary of Labor upon his consideration of it was the fact that it had not been presented before the local immigration service prior to the entry of this final denial (Exhibit A, pp. 72 and 80). This presents a situation of the governmental officers charged with the enforcement of the Chinese Exclusion Laws taking advantage of the injury which they themselves had done to this appellant in not complying with their own public regulations and instructions.

The appellant's father, Jang Sing, otherwise known as Jang Wey Ming, went to China as a de-

parting Chinese merchant under the name of (Jung) Ah Fook; he departed in 1907 and returned September 27th, 1908, he, at that time, claiming to be a member of Hong Sing Kee Co., a firm engaged in business on G Street, Fresno (Exhibit B). It is upon this trip to China that he became married, and as a result of this union and upon this trip to China, this appellant was born. The Government omitted taking any statement from the father upon his return from this particular trip to China; they had the opportunity but did not avail themselves of it. The father next went to China upon a laborer's return certificate under the name of Gang or Jang Sing, and prior to his departure the merits of his case were examined into at Fresno, and in the course of his examination, which was quite protracted, he was asked the following questions (Exhibit D, pp. 1 and 2):

"Q. What are your names?
A. Gang Sing; no other name.
Q. Were you ever known by any other name?
A. No.
Q. Have you been to China?
A. No.
* * * * * * *
Q. Have you a family in this country?
A. No.
Q. Have you any property in this country?
A. No.
Q. Does anyone owe you any money?
A. Jung Hing Ying, farmer, Reedley, California.
* * * * * * *
Q. Are you married?

A. No.
Q. Were you ever married?
A. No."
* * * * * * *

The father returned from China on this visit as incoming passenger No. 182 on the S. S. Manchuria, October 29, 1912, and was examined upon the steamer prior to being readmitted, and he then stated that he had been married once, that his wife was Sim Shee to whom he had been married K. S. 33-12-21 (January 23, 1908), that she had natural feet and was living in China, that they had one boy and no girls, the boy's name being Jang Jow Sheung, five years old, who was born K. S. 34-12-22 (January 12, 1909), and was then in China (Exhibit D, p. 8). It will be observed that this prior adverse declaration upon which the Government relied to deny this case was made in 1911, and within a year, and in fact upon the return of this identical trip to China, the father is of record with testimony in exact conformity with that contained in the present case, making, of course, due allowance for phonetical differences in spelling.

Reading the prior adverse declaration which, if true, precludes the paternity claimed in this case, must convince one that the father should have been confronted with these prior adverse statements and his explanation asked with respect to the same before a final adverse decision was rendered in this case, so that suitable opportunity would have been given to present any additional, or other, evidence at the

father's disposal, or which he could obtain, which would explain the statements and further corroborate the testimony as to the relationship. The testimony already of record concededly was ample to establish the existence of the relationship except as it was detracted from, or, let us say, impeached, by the existence of this prior adverse declaration, the existence of which was withheld from the appellant, his father and his attorney.

Thereafter appellant's attorney secured affidavits from a number of additional witnesses who had personal knowledge of the prior marriage of the father of the appellant, and also of the birth of the appellant, all as testified to by the father and the appellant (Exhibit A, pp. 95-99). These affidavits were prepared as a foundation for the subsequent examination of these particular affiants as prospective witnesses in this case. This additional testimony consisted of the affidavit of Jang Lou Wong, otherwise known as Sam Yick, and Lee Jen, his wife (Exhibit A, pp. 98 and 99), who were residents of Bakersfield, and had long been acquainted with the father of this appellant Jang Sing, and they went to China together as a party on the S. S. Mongolia November 16, 1907. Their homes in China were in close proximity and they knew that Jang Sing was going to China upon that visit particularly for the purpose of being married. They were in China at the time and were present at Jang Sing's marriage, and they remained in China for a period of about two years after the father, Jang

Sing, had returned to this country. They knew his wife in China, they saw his son, this appellant, shortly after his birth, and upon a number of occasions prior to their return. Their affidavit gives all the facts with respect to their departure and their residence in China, and their departure and return records were in the custody of the respondent showing that they had made the trip in question, and their testimony was of record as to their place of residence and showing that it was in close proximity to the home of Jang Sing, as claimed by them. The affidavit recited that those facts were within their own personal knowledge and they expressed their entire willingness and desire to appear and testify in support of the facts recited therein. There was presented an affidavit of Wong Wing Sing (Exhibit A, pp. 97 and 96) who had been for many years a resident of California, stating that he was for many years acquainted with Jang Sing, this appellant's father, and that he had during all the years handled and supervised the financial affairs of Jang Sing; that he knew of Jang Sing's going to China in 1907, and knew that the object of that trip was to be married. Upon his return from China in 1908 Jang Sing informed this affiant of his having been married, and for many years thereafter there was transmitted through this affiant's store sent by Jang Sing to China for the support of his family which consisted of his wife and child. There was also presented the affidavit of Hong Gong Chong (Exhibit A, p. 95), who had recently

been in China, and who was personally acquainted with Jang Sing, and had been for many years last past; that his home in China was in extremely close proximity to that of Jang Sing, and that while there he knew of Jang Sing and his wife and family in China. These affidavits were sent on to the Department at Washington for consideration with the appeal. Instead of returning the record to the San Francisco office for the examination of these additional witnesses the Secretary of Labor proceeded to and did finally dismiss the appeal without affording the appellant any opportunity to have the testimony of the witnesses in question taken (Exhibit A, pp. 58 to 72). Thereafter appellant strenuously objected to the order of deportation without being afforded the chance to have the testimony of his additional witnesses taken, and the Secretary of Labor referred the matter to the Commissioner of Immigration at San Francisco for his report in the premises (Exhibit A, p. 72). Thereupon, and on January 4, 1923, attorney for the petitioner presented a full statement and a request for a rehearing, setting forth the grounds upon which the same was based (Exhibit A, pp. 85 to 91). The request was referred by the Commissioner to the court officer of his service, Mr. P. A. Robbins, who thereafter made a report recommending that the case be reopened and reheard. This recommendation was conveyed to the Secretary of Labor who directed the reopening and rehearing of the case. The report of court officer Robbins and the

order of the Secretary granting the rehearing were, of course, not open to the inspection of the attorney for the appellant. Thereafter the case was sent to Fresno, where all the additional witnesses were fully heard and examined (Exhibit A, pp. 104 to 123). The case was redenied and reappealed, and the record of the additional hearings and the report of court officer Robbins, and the decision of the secretary reopening the case, were then for the first time open to the inspection of the attorney for the appellant. The report of court officer Robbins (Exhibit A, pp. 92-93) recommended a reopening of the case because he was of the opinion that if the immigration service did not reopen it that the court would on habeas corpus grant the writ and try the case de novo, and the Secretary of Labor in his order (Exhibit A, p. 74), directed the reopening of the case for the purpose of preventing a court action in which it was feared the court would adjudge the prior immigration unfair and try the case upon its merits de novo before the court, and to prevent this contingency the case was reopened. The reopening does not seem to have sprung from any feeling upon the part of the immigration authorities that their prior hearing had been at all unfair or the rights of the appellant infringed upon; in fact, the tenor and words of the Secretary in his order reopening the case is a substantial defense of his position of having accorded the appellant every right and consideration and that he was entitled to no more, but that through

fear that the court might hold otherwise and assume jurisdiction and retry the case on its merits in a court of justice the Secretary would reopen the case and rehear it to prevent that contingency.

The appellant accepted the rehearing in good faith in the belief that the reopening was prompted by consciousness on the part of the officers who directed it that the earlier hearing had been unfair, and that through inadvertence, or otherwise, the governmental officers had abused the discretion vested in them, and prompted by such consciousness on their part they would reopen and reexamine the case and fully and fairly reconsider it with minds open to be properly influenced by the evidence which the secretary had refused to direct to be taken in the original appeal. Fair play to the appellant would have dictated that the case should be reopened by the secretary for such purpose. Had the appellant known that the reopening was granted solely to prevent the court adjudicating the original hearing unfair and trying the case upon its merits, and that the secretary still maintained the propriety and legality of his earlier action in the case, this appellant would have immediately taken his case into court.

The report of court officer Robbins, hereinbefore referred to (Exhibit A, pp. 92-93) concludes as follows:

> "There is another question involved in the present case, which, to my mind, if the matter was taken into court, a writ of habeas corpus

would result in the court holding the hearing unfair, and might possibly result in a hearing de novo before the court, and that is that at the time the father was examined in Fresno he was not confronted by his declaration made in 1911 that he was not married.

"Under dates of Sept. 20, 1919, and Oct. 14, 1919, the Department in its letters 54697/23, directed that in all future cases all witnesses be so confronted with these prior declarations. It is possible, however, that Inspector Moore of Fresno, who at that time was under the jurisdiction of the Los Angeles Office, was not informed of this procedure, which may account for his failure to bring this matter to the attention of the alleged father.

"In view of the fact that the father was not confronted with his prior declaration and the probability of habeas corpus proceedings being instituted, I would recommend that the case be reopened for the taking of the evidence of such additional witnesses as the interested parties may desire to submit and that the father be confronted with his prior declaration."

While the decision of the secretary granting the reopening (Exhibit A, p. 74), has the following to say with respect to the earlier hearing:

"The record contains the affidavit of two persons who claim to have a knowledge on the essential facts. These affidavits were considered when the case was previously before the Board of Review, and the conclusion was reached that it would be unnecessary to delay disposing of the case until the testimony of the affiants could be taken, provided the affidavits were considered as embodying substantially what the affiants would testify to. Counsel also pointed out in his brief that the immigration officials, in examining the alleged father had failed to

> question him regarding his testimony of 1911, during the course of which he made statements inconsistent with the claims of paternity now advanced. This point likewise was not regarded as of sufficient importance to call for the return of the record to San Francisco."

And referring to the case of Low Joe, now reported (Exhibit A, pp. 82-84) (287 Fed. 545), the secretary goes on to show why he grants a rehearing:

> "* * * This impresses the Board of Review as somewhat remarkable, but the United States Attorney at San Francisco does not believe an appeal to be advisable, and it is therefore, likely that the District Court, if the case of Jang Dao Theung were to come before it, would, reasoning along lines similar to the Low Joe case, hold this hearing also to be unfair, because the alleged father was not questioned regarding his 1911 testimony. For this reason it would seem to be advisable to reopen the case, and as long as delay is now inevitable there is no real reason for not also taking the testimony of the additional witness. The Board of Review recommends that the case be reopened in order that the testimony of the additional witnesses may be taken, and also, in order that the father may have an opportunity to submit such explanation as he may be advised of his 1911 statements."

It is noteworthy to observe that in this order of the secretary reopening the case there is expressed no consciousness of any wrong done the appellant, and no hope or assurance held out that the evidence which he desired to have taken would be carefully weighed and considered and the case redecided in

the light of what might be developed in such additional and further examination and development of the facts; quite the contrary, however, was the affirmative statement disregarding the statements of the unexamined witnesses as embodying in their affidavits that they had reached the conclusion that it would be unnecessary to delay disposing of the case until their testimony could be taken provided their affidavits were considered as embodying substantially what their testimony would be, and also that the failure to confront the father with the prior adverse declaration likewise was not regarded of sufficient importance to call for the return of the record to San Francisco. The real reason for granting the rehearing was apparently not to afford the appellant any additional right to be fully and fairly heard, but, as stated by the secretary,

> "* * * and it is, therefore, likely that the District Court, if the case of Jang Dao Theung were to come before it, would, reasoning along lines similar to the Low Joe case, hold this hearing also to be unfair, because the alleged father was not questioned regarding his 1911 testimony. *For this reason it would seem to be advisable to reopen the case, and as long as delay is now inevitable there is no real reason for not also taking the testimony of the additional witness.*"

Appellant had a right to presume that the rehearing accorded him was prompted by a consciousness upon the part of the secretary that his prior order was arbitrary and that the appellant had been denied the full and fair hearing to which he

was entitled under the law, and not, as seems to be indicated, a rehearing at which the empty forms should be observed which would deprive the appellant of the right to a judicial hearing which, at that juncture of the case, seemed to be conceded to him. The actuating reason in the mind of the secretary for according the rehearing was to prevent the court from assuming jurisdiction and trying the case de novo upon its merits, and the substantial benefit which the appellant expected from the rehearing finds no place in the order granting the rehearing, the contents of which were withheld from the appellant until after the entry of the second and final denial (see petition, sub-division 4, T. R. 10-14). The father's testimony upon reexamination wherein he was confronted with and called upon to explain the prior adverse declaration is as follows (Exhibit A, pp. 118 to 119):

"Q. On which trip were you married?
A. Married on my first trip.
Q. What was the date of your marriage?
A. K. S. 33-12-21 (January 23, 1908).
Q. If you were married in January, 1908, what was the purpose of testifying in San Francisco in November 1911, that you were not married?
A. I didn't testify to that.
Q. You are advised that your record covering your departure from San Francisco as a laborer in 1911 indicates that on Nov. 18, 1911, you were questioned as follows: 'Q. Are you married?' A. 'No.' 'Q. Were you ever married?' A. 'No.' In view of this testimony, what explanation have you to offer?
A. I was advised by the Chinese interpreters that to go home to China as a laborer, you

either had to have a wife and family in the United States or have $1,000 worth of property or debts. As I didn't have a wife or family in the United States I said 'No'. When they asked whether I was married or ever had been married I understood them to mean if I was ever married or had a family in the United States. I had a wife and family in China at that time and had one son who was born after my return to the United States in K. S. 34 (1908).

Q. Your record further indicates that you were asked the direct question: 'Have you a family in this country?' and you replied: 'No', The questions just quoted to you are distinct and separate. Please explain how you misunderstood the question: 'Are you married?' to refer to whether you were married only in the United States?

A. They were talking about having a family in the United States and I supposed that all the questions referred to whether I had a family in the United States. It was a misunderstanding on my part.

Q. Did the interpreter speak the same dialect that you spoke in your hearing in 1911?

A. Yes, we both spoke the See Yip dialect, but the interpreter seemed to take a dislike to me and spoke very gruffly to me, didn't give me an opportunity to answer questions fully and didn't always make himself plain. It may be that he misunderstood me, but I know that he gave me the wrong impression and led me to believe that he only referred to whether I had a family in the United States."

The finding of the secretary upon this feature of the case is as follows (Exhibit A, pp. 141 and 142):

"The prior testimony of the alleged father which, if true, precluded his being the father of the applicant, will be found discussed in the

> memorandum of Dec. 21, 1922. It seems that the alleged father when testifying in his own behalf as an applicant for laborer's return papers, stated that his name was Jang Sing; that he had no other name, that he had never been known by any other name; and that he was not married. The year of the applicant's birth is given as 1909. It is now claimed by way of explanation that the alleged father when he testified in 1911 was referring to a wife in this country, he having been told previously that in order to qualify for a laborer's return paper he must have a wife or family, or debts in the amount of $1,000 due him here. This explanation in view of the unequivocal testimony of the alleged father at that time that he had no other name and had never been known by any other name, is not believed to be satisfactory, in view of the well known and almost universal custom of the Chinese of taking an additional name, known as the 'marriage' name when they marry."

We claim that the above finding of the secretary is impeached by the records of this case and by the law regulating the departure of Chinese laborers from the United States. The secretary lays stress upon the fact that the father testified that his name was Jang Sing, and that he had no other name and that he had never been known by any other name, and yet this did not make it so, because the secretary then and there had before him the official records of his office, which disclosed that three years previously this same party was known by, and had gone under the name of Jang Ah Fook. The father further testified at that time that he had never made any previous trips to China, and yet this did

not make it so, because the secretary had before him his official record (Exhibit B), showing that the father had made an earlier trip to China notwithstanding his statement to the contrary. In this same disputed statement of 1911 the father was asked if he had any property in this country and he said "No", and as showing the ease with which misunderstandings may exist when such examinations are conducted through the medium of an interpreter he goes on to testify that he did have property here consisting of debts due him of at least $1000, which were approved by the immigration authorities as existing and used as a basis and foundation for the issuance of the laborer's return certificate upon which the father made his trip to China as a laborer in 1911. Here are three separate and distinct misstatements of the father which are shown by the records before the Commissioner,—and the verity of which records are not questioned—which show facts contrary to those given by the father in 1911. The secretary states that the father's explanation as to stating that he was not married, namely, that he thought the questions referred to his condition in this country, was not convincing, and yet the applicant was being examined for a laborer's return certificate and Section 6 of the Act of Congress of September 13, 1888 (25 Stat., pp. 476-477), states as follows:

> "Sec. 6. That no Chinese laborer within the purview of the preceding section shall be permitted to return to the United States unless he has a lawful wife, child, or parent in the United

States, or property therein of the value of one thousand dollars, or debts of like amount due him and pending settlement."

When we observe the statutory foundation for the examination of a laborer's return certificate we see that the explanation made by the appellant's father is exactly in conformity with the law, and not only that, when we take up this old examination of 1911 we find that the questions first asked of the father as to his marital status were limited and restricted to this requirement of the statute:

"Q. Have you a family in this country?
A. No."

And it is to be observed that the limitation spoken of by the father is contained in the question as asked of him, and when we consider that the father is rather a simple, primitive and uneducated man who is testifying through the medium of a Chinese interpreter it is not to be wondered at that in the latter part of his examination when he was asked the question, "Are you married?" and "Were you ever married?", that he should have understood these two questions to be subject to the same limitation as to his status in this country, because that was the requirement of the law, and the exact form in which the first question upon that point was asked of him through the medium of the Chinese interpreter. Certainly such a reasonable explanation so amply verified should not be lightly thrust aside and disregarded.

The decision of the secretary upon the testimony of the additional witnesses is as follows (Exhibit A, pp. 141 and 142):

> "Four witnesses have testified in the reopening hearing at San Francisco. Wong Bing Sing claims to have known the alleged father for many years and to have attended to details for him when he (alleged father) was sending money to his family in China. This witness does not know the wife of the alleged father nor has he ever seen the applicant, according to his testimony. Jang Low Wong and his wife, Lee Jen, state that when they went back to China in 1907 the alleged father was a passenger on the same boat, in fact it appears from their testimony that they were returning to China as a party. They state that the alleged father told them he was returning to China to marry and they further testified that they attended his wedding in the home village. Lee Jen also states that she saw the applicant when he was a few weeks old. Hong Gong Chong testifies that he has known the alleged father for fifteen or twenty years and when he (witness) was in China in 1921-22 he met the applicant's mother on the streets of her village. She told the witness that her son Jang Dao Theung had gone to the United States, but that she did not know as to whether or not he had as yet joined his father here. She asked the witness to find out about it and he communicated with the alleged father on the subject when he arrived back at San Francisco. The testimony of all of the witnesses is in good agreement, and would certainly be sufficient to establish the right of the applicant to enter the United States, were it not for the prior adverse testimony of the alleged father."

As a legal proposition we submit that what the secretary seems pleased to consider as a conflict in the testimony given at different times by the father could only have the legal effect of impairing the father's credibility and pointing out that his testimony should be scanned with care, or requiring that it should be corroborated. In no sense can it, in fact or in law, impeach the credibility of these witnesses, or warrant the disregarding of their testimony, as their credibility is unassailed and they have personal and exact knowledge of the precise fact in issue, namely the existence of the relationship of father and son between this appellant and his father. These elements are covered in the petition for the writ (Par. 5 T. R. 14-15). The conclusiveness of the evidence is covered in paragraph 1 of the petition (T. R. 6-7); the failure and refusal of the secretary to cause the father to be confronted and given a chance to explain his earlier and adverse declaration, which occurred in and characterized the first hearing, is covered in paragraph 2 of the petition (T. R. 7-8); complaint against the action of the secretary in refusing to examine and take the testimony of the additional witnesses, which also characterized the first hearing, is contained in paragraph 3 of the petition (T. R. 8-9-10). The assignments of error are contained on pages 24 and 25 of the transcript and need not be restated in detail.

## Argument.

Appellant contends that the hearing accorded in this matter by the immigration authorities was unfair as respects the procedure followed during the hearing and additionally that there was a manifest abuse of discretion in the consideration of the evidence presented, and finally that there was a fundamental misconception of the basic rules of evidence.

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### 1. THE QUESTION OF PROCEDURE.

Upon the question of procedure followed it is respectfully maintained that it was the duty of the Secretary of Labor upon the receipt of the appeal record from the San Francisco office and the receipt from the attorney in Washington of the affidavits of certain proposed additional witnesses to have returned the case to the San Francisco office with instructions to afford the appellant an opportunity to present the proposed additional witnesses for examination to the end that their testimony might be taken and that he might have the benefit of it upon appeal.

An inspection of the record disclosed that the sole reason urged for the denial of the case was the fact that it was claimed that the father had made a statement in 1911 that he was not, and never had been, married, whereas his testimony in the present case was to the effect that he had been married in

1908. The standing rules of the department, and the instructions of the department to the Commissioner of Immigration at San Francisco were in all such cases the father should be confronted with the prior declaration and be given an opportunity to admit, deny or explain the same. It is admitted that these instructions were posted in a public place at the Angel Island immigration station for the information of attorneys and inspectors. The record disclosed that this departmental regulation had not been complied with, and hence the case was closed for the reception of evidence without the father having been given an opportunity to be heard thereon. Instead of sending this case back to San Francisco for this purpose the Secretary of Labor proceeded to consider the substance of the affidavits and dismissed the appeal without taking the testimony of these proposed witnesses. We submit that this was fundamental error and rendered the hearing of the case absolutely unfair. We contend that the Secretary of Labor and his subordinate immigration officers were compelled by law to take the testimony of all material witnesses, and that they had no choice in the premises of electing to hear this witness or that witness, and any alleged hearing wherein they refused to take the testimony of material witnesses upon the crucial point in the case was manifestly unfair and would render their procedure nothing but the semblance of a hearing. Upon this point we cite the following authorities:

In the case of *U. S. v. Sing Tuck* (194 U. S. 161; 48 L. Ed. 917; 24 Supt. Ct. Rep. 621), wherein the court held:

> "* * * No right is given to the officer to exercise any control or choice as to the witnesses to be heard, and no such choice was attempted in fact. On the contrary, the parties were told that if they could produce two witnesses who knew that they had the right to enter, their testimony would be taken and carefully considered; and various other attempts were made to induce the suggestion of any evidence or help to establish the parties' case but they stood mute. The separate examination is another reasonable precaution, and it is required to take place promptly, to avoid the hardship of a long detention. In case of appeal counsel are permitted to examine the evidence, Rule 7, and it is implied that new evidence, briefs, affidavits, and statements may be submitted, all of which can be forwarded with the appeal, Rule 9. The whole scheme is intended to give as fair a chance to prove a right to enter the country as the necessarily summary character of the proceedings will permit."

It will be noted that the rules with respect to the production of additional evidence after the denial of the case at the port of entry have been changed since the adjudication in the case just cited. The present rules provide that if after a consideration of the evidence presented the applicant is deemed inadmissible that the attorney or representative shall be notified of that fact, thus giving and affording an opportunity to present additional evidence before the final denial after the entry of which the case is no longer open for the reception of evidence.

Under Section 17 of the General Immigration Act of February 5, 1917, it is noted that the review on appeal is restricted to the evidence which was received and considered by the Board of Special Inquiry at the port of entry. The Chinese rules and regulations, Rule 3, subdivisions 2, 3 and 4, provide for board hearings in Chinese cases under the Chinese Exclusion Laws. These subdivisions are as follows:

> Subd. 2. Order of Examination Under Immigration and Exclusion Laws. — Chinese aliens shall be examined as to their right to admission under the provisions of the immigration law and rules as well as under the provisions of the Chinese exclusion treaty, laws, and rules. As the former law and rules relate to aliens generally, the status of Chinese applicants must be first determined thereunder; then if found admissible under the immigration law and rules, their status under the Chinese exclusion law and rules shall be determined. In order to avoid inconvenience, delay, or annoyance to Chinese applicants through misunderstanding, and in the interest of good administration, examination under both sets of laws and rules shall be made in the order stated, only at the ports named and in the manner specified in Rule 1 hereof.
>
> Subd. 3. Hearings.—Boards of special inquiry shall determine all cases as promptly as in the estimation of the immigration officer in charge the circumstances permit, due regard being had to the necessity of giving the alien a fair hearing. Hearings before the boards "shall be separate and apart from the public"; but the alien may have one friend or relative present after the preliminary part of the hearing has been completed: Provided, First, that

such friend or relative is not and will not be employed by him as counsel or attorney; second, that, if a witness, he has already completed the giving of his testimony; third, that he is not the agent or a representative at an immigration station or an immigration aid or other similar society or organization; and, fourth, that he is either actually related to or an acquaintance of the alien.

Subd. 4. INTRODUCTION OF ADDITIONAL EVIDENCE.—If upon examining the applicant and the witnesses appearing in his behalf the board of special inquiry does not conclude that the applicant is admissible, notice shall be served upon the applicant or his attorney to that effect, such notice to state the respect or respects in which the evidence is deemed by the board of special inquiry to be insufficient. If the applicant or his attorney within five days thereafter expresses a desire to introduce additional evidence, ten days from the date of the first mentioned notice shall be allowed for that purpose. If neither the applicant nor his attorney thus indicates a desire to introduce additional evidence, the case shall be closed.

While Section 17 of the General Immigration Act of February 5, 1917, providing for the boards of special inquiry in their hearings and final decisions, contains this clause:

"* * * But either the alien or any dissenting member of the said board may appeal through the commissioner of immigration at the port of arrival and the Commissioner General of Immigration to the Secretary of Labor, and the taking of such appeal shall operate to stay any action in regard to the final disposal of any alien whose case is so appealed until the receipt by the commissioner of immigration at

> the port of arrival of such decision which shall be rendered solely upon the evidence adduced before the board of special inquiry. * * *"

It is, therefore, respectfully contended upon behalf of the appellant in this case that under subdivision 4 or Rule 3 of the Chinese Regulations it would have been the duty of the Commissioner to have advised the appellant's attorney, not only that they were not satisfied with the existence of the relationship (Exhibit A, p. 38), but such notice should also have stated "the respect or respects in which the evidence is deemed by the board of special inquiry to be insufficient"; in other words, under the regulation that should have advised us in the notice of the existence of the prior adverse statement of the father which they relied upon as the basis for their preliminary adverse holding. Thus we see not only did they violate the regulations of the Department which were posted upon the bulletin board at Angel Island with respect to confronting the father with the prior declaration, but they additionally violated subdivision 4, just quoted, in failing to give appellant's attorney the information about the crucial point involved in the case. We therefore contend that this point is controlled by the decision of the Supreme Court in the case of *Chin Yow v. U. S.* (208 U. S. 8; 52 L. Ed. 369; 28 Sup. Ct. Rep. 201), wherein the court held:

> "* * * The petition alleges that the petitioner is a resident and citizen of the United States, born in San Francisco of parents domiciled there, but it discloses that the Commis-

sioner of Immigration at the port of San Francisco, after a hearing, denied his right to land, and that the Department of Commerce and Labor affirmed the decision on appeal. * * *"

"* * * But the petition further alleges that the petitioner was prevented by the officials of the commissioner from obtaining testimony, including that of named witnesses, and that had he been given a proper opportunity he could have produced overwhelming evidence that he was born in the United States and remained there until 1904, when he departed to China on a temporary visit. We do not scrutinize the allegations as if they were contained in a criminal indictment before the court upon a special demurrer, but without further detail read them as importing that the petitioner arbitrarily was denied such a hearing, and such an opportunity to prove his right to enter the country, as the statute, meant that he should have. * * *"

"* * * We recur in closing to the caution stated at the beginning, and add that, while it is not likely, it is possible, that the officials misinterpreted rule 6 as restricting the right to obtain witnesses which the petitioner desired to produce, or rule 7, commented on in United States v. Sing Tuck, (194 U. S. 161, 169, 170; 48 L. Ed. 917, 921; 24 Sup. Ct. Rep. 621), as giving them some control or choice as to the witnesses to be heard."

In the case of *Kwock Jan Fat v. White* (253 U. S. 454; 40 Sup. Ct. Rep. 566), the court held as follows.

"The acts of Congress give great power to the Secretary of Labor over Chinese immigrants and persons of Chinese descent. It is a power to be administered, not arbitrarily and secretly, but fairly and openly, under the re-

straints of the traditions and principles of free government applicable where the fundamental rights of men are involved, regardless of their origin or race."

Turning our attention now to the original decision of the Secretary of Labor (Exhibit A, p. 65) we find that official considering the affidavits of these proposed additional witnesses, we find him admitting that the affidavits do set forth very persuasive matter, and that the evidence therein contained would be amply sufficient to justify the landing of the appellant were it not for the existence of this prior declaration of the father in 1911 that he was not, and never had been, married, whereas according to the claims upon behalf of the present appellant the father was at that time married and father of this appellant. When we take into consideration that the Secretary of Labor was passing judgment upon an appeal record in which his own regulations had been twice violated, first, in the failure and neglect of the officers at the port of entry to confront the father with the prior adverse declaration and give him an opportunity to admit, deny or explain the same, which would have afforded him an opportunity before the final denial of the case to submit additional evidence with respect thereto (Exhibit A, pp. 92 and 93, and pp. 85 to 91), and second, we find them additionally violating subdivision 4 of Rule 3 of the Chinese regulations in failing in their notice of the preliminary denial to the appellant's attorney to specify the existence of this prior declaration as the controlling and crucial ob-

jection to the case (Exhibit A, p. 38), it certainly would have been but elemental justice for the Secretary of Labor to have either accepted these affidavits at their face value or, on the other hand, to have directed the reopening of the case for the purpose of permitting the appellant to have the testimony of these named and designated witnesses taken before the regular immigration officials, and certainly he was most unwarranted in assigning as one of the reasons for his refusal to do so the fact that the witnesses should have appeared and should have testified before the officials at the port of entry. This last mentioned reason is not disclosed in his original opinion but comes forth with startling frankness in his telegram to the Commissioner of Immigration at the Port of San Francisco (Exhibit A, pp. 72 and 78) these being respectively telegrams from the secretary to the commissioner at San Francisco and from commissioner at San Francisco to the Secretary of Labor at Washington. The reason why these witnesses were not originally presented was because the hearing accorded the appellant was manifestly unfair. Had the appellant been appropriately notified and advised of the existence of the point of this prior adverse declaration these additional witnesses would certainly then and there have been presented and their testimony taken and it would hence have been freed from the detracting objection which seems to have so potently influenced the Secretary of Labor against their examination before a decision of the case upon its merits.

I presume that the Government will maintain that these objections are all answered by the fact that the secretary thereafter reopened the case and directed that the father should be so confronted with his prior earlier adverse declaration as to his then marital condition, and also directed the taking of the testimony of these proposed additional witnesses. Our answer upon this point is the fact that we were only informed that the case had been reopened for the taking of this additional testimony, but were not informed of the reasons why the Secretary of Labor was actuated in granting this rehearing. Appellant supposed that this rehearing had been prompted by a consciousness upon the part of the Secretary of Labor that the earlier hearing had been unfair and that there had been an abuse of the official discretion committed to him in his earlier adverse finding, and that a rehearing and reconsideration of the case should be had in which there would be a full and fair reexamination and a new determination of the appeal in which a final judgment would be rendered upon and after a full and fair consideration of the evidence. We did not know, and did not discover, until after the final denial of the case that reason set forth for the reopening of the case was really to prevent a writ of habeas corpus being then and there applied for which would have resulted in a trial de novo before the court wherein the fact of appellant's admissibility would be judicially determined. This latter situation is fully presented and disclosed in the report of court officer Robbins (Exhibit A, pp. 92

and 93), and in the opinion of the Secretary of Labor in reopening the case (Exhibit A, p. 74). We did not know that in granting this rehearing that the Secretary of Labor had already prejudged and predetermined the evidence which we sought to introduce; we did not know that the secretary had already held in his order granting a rehearing with respect to the examination of the father confronting him with a theretofore undisclosed prior adverse declaration and taking the testimony of the proposed additional witnesses, that with respect to these matters the secretary in his very order granting the rehearing held:

> "* * * This point likewise was not regarded as of sufficient importance to call for the return of the record to San Francisco."

It is apparent from these rulings and holdings of the Secretary of Labor that the rehearing accorded in this matter was already prejudged and predetermined adversely to the appellant even before the rehearing had taken place, and that the sole reason urged for the granting of the rehearing and the sole reason put forth in the order granting the same was to prevent the writ of habeas corpus being then and there applied for. The attitude of the department with respect to this matter savors somewhat of the conditions considered by Judge Dooling in *Ex parte Chan Shee* (236 Fed. 579), and we quote from pages 583 and 584 as follows:

> "* * * The right to appeal is a valuable right, and no one is in a position to say what

would have been the result if applicant had prosecuted her appeal to a conclusion. It cannot be said that the Bureau encouraged applicant to dismiss her appeal. On the contrary she was advised:

"'That the department would prefer that she prosecute the action before the courts to a final conclusion in the event she is desirous of further contesting the authority of the department to deport her.'"

"If this were all, applicant might not be in a position to complain of the action of the department in refusing to reopen her case after the dismissal of her appeal. But when this refusal is based upon the unwarranted assumption, as is evident from the records of the department itself, that before her appeal was dismissed she was informed that the evidence of her marriage in this state, which she desired to offer as proof of her right to enter, was regarded by the department as proof that she had no such right, and that the department had declared that 'action looking to a reopening of the case will not be taken', I cannot but feel that she has not been accorded that fair hearing upon her application, to which she is entitled under the law."

There are two other cases cited in the telegrams and correspondence in the immigration record to which the court's attention should be invited for reference purposes, the first being *Ex parte Low Joe* (287 Fed. 545), and the other being the case of *Mah Shee v. White* (242 Fed. 868), both of which have to do with the right of the appellant to submit testimony upon his own motion in addition to that brought out by the immigration authorities.

2. MANIFEST ABUSE OF DISCRETION IN CONSIDERING THE EVIDENCE AND FUNDAMENTAL MISCONCEPTION OF THE BASIC RULES OF EVIDENCE.

It is contended as a proposition of law that the Secretary of Labor in determining one of these appeals may manifestly abuse the discretion vested in him by law solely in his consideration of the evidence as in questions of procedure of the hearing itself. I concede that there is quite a latitude of discretion vested in the secretary in the weighing and the determination of the evidence presented before him, and as long as his decision falls within the latitude of that discretion, that his consideration of the evidence is not subject to judicial reviews; but further, and beyond this, I contend that the evidence may be so clear and so positive upon the facts in issue that it can and does establish the admissibility of the appellant beyond all doubt that in such cases the action of the secretary in refusing to be guided by it is a manifest abuse of the power committed to him. For authority for this legal proposition I desire to cite the case of *Kwock Jan Fat v. White* (253 U. S. 454; 40 Sup. Ct. 566), wherein the court recapitulating its earlier holdings in cases of this character, holds as follows:

> "It is fully settled that the decision by the Secretary of Labor, of such a question as we have here, is final, and conclusive upon the courts unless it be shown that the proceedings were 'manifestly unfair', were 'such as to prevent a fair investigation', or show 'manifest abuse' of the discretion committed to the executive officers by the statute, Low Wah Suey v. Backus, supra, or that 'their authority was

> not fairly exercised, that is, consistently with the fundamental principles of justice embraced within the conception of due process of law', Tang Tun v. Edsell, Chinese Inspector, 223 U. S. 673, 681, 682; 32 Sup. Ct. 359, 363 (56 L. Ed. 606). The decision must be after a hearing in good faith, however summary, Chin Yow v. United States, 208 U. S. 12; 28 Sup. Ct. 201; 52 L. Ed. 369, and it must find adequate support in the evidence, Zakonaite v. Wolf, 226 U. S. 272, 274; 33 Sup. Ct. 31; 57 L. Ed. 218."

Now, in the present case it is admitted and conceded by the secretary in all of his decisions and holdings that the evidence presented was and is ample to establish the admissibility of this appellant save as the evidence might be detracted from by reason of his father's prior adverse declaration hereinbefore referred to. The secretary concedes that were it not for this one circumstance that the appellant would be entitled to admission. This brings us to a consideration of the principles of law which fundamentally govern the reception and the exclusion of evidence. It is now, and has been for a number of years past, the policy of the immigration service that in these Chinese admission cases where there existed a prior declaration as to marital status or paternity inconsistent with that developed in the case then under examination, that the immigration officers at the port of entry should regard this prior adverse declaration as an absolute estoppel which would preclude the existence of the relationship claimed and thus pass on for final determination of the question involved in the appeal

to the secretary. Such a method and mode of procedure is a great injustice to an applicant for admission because it deprives him of the right to a full and fair determination of his claim of admission by the only officers to come personally in contact with him, namely, the officers at the port of entry. Such a situation recently engrossed the attention of the Court of Appeals for the Second Circuit, in the case reported as *U. S. v. Pierce* (289 Fed. 233), wherein the court held:

> "In some way not disclosed they supposed themselves, because of the inconsistent stories told by the father and by the stepmother, bound to record a finding contrary to their real decision on the single relevant issue. In that they, of course, were in error. As in any other case, there are no regulative canons for the determination of a question of fact. Inconsistencies may be explained and improbabilities met by the mere weight of the testimony. In this particular case there was, indeed, nothing suspicious in the father's explanation to anyone familiar with the notions of primitive people. The mention of a dead person's name is very generally taboo in primitive culture. But we have nothing to do with the propriety of the board's actual decision; it is enough that the statute gives them the final word.
>
> "The evidence of the board's mistake was good enough; it was incorporated into the record itself; and emanated from the official superior of the members, to whom it had presumably come from them themselves. It makes no difference how it did come; being the declaration of such a person, it was evidence of the fact. These proceedings need not be conducted with the strictness of an action or suit. The courts have again and again sanctioned the ad-

mission of evidence against aliens which was not competent at law, so long as the substance of a fair hearing is preserved. We can scarcely apply such a loose procedure to exclude immigrants and decline to give them its benefit when it works for them. Especially would it be unfair, after submitting Chinese to the not too lenient administration of the immigration and exclusion laws, to deny them what they are entitled to in very right and substance. It is not necessary to say that the inspector's letter of April 28, 1922, was an official record admissible in a court of law; but we hold that in these proceedings it is probative of the facts which it contains."

"Such being the case, the relator was never properly excluded at all; he should have been admitted. The procedure of exclusion is laid down in sections 15, 16, and 17 of the Immigration Act (Comp. St. par. 4289¼hh—4289¼ii). Under sections 15 and 16 it is provided that immigration inspectors shall board all incoming vessels and inspect immigrants; they may detain for examination any whom they suspect of being ineligible. Any alien, who after such an examination shall not appear to the examining inspector beyond doubt to be eligible for entrance, shall be detained for examination by a board of special inquiry. Section 17 prescribes that 'such boards shall have authority to determine whether an alien who has been duly held shall be allowed to land or shall be deported'."

"As we view it, this section makes conclusive a unanimous finding of the board in favor of admission and to disturb it the Secretary of Labor has no power. Now, it is true that the finding was for exclusion; but the record on its face showed that the finding was erroneous, and that the board should have entered precisely the contrary finding. While,

then, the Assistant Secretary had jurisdiction of the appeal, he should have corrected the finding by making it accord with the true decision of the board, the tribunal which alone had any power to pass upon the issue. In substance, however, the case was one over which he had no supervisory jurisdiction, because the board had really decided that the relator had proved his case. In affirming the erroneous finding, it therefore appears to us that the Assistant Secretary disregarded an error which he should have corrected, and assumed a jurisdiction which he did not possess."

While in the case *In re Wong Toy* (278 Fed. 562), at pages 563 and 564 it is held:

"It seems clear that the weight of the evidence on the question of the father's citizenship is in his favor. This was sufficient to entitled the petitioner to a finding in his favor on the point. But the immigration tribunals apparently exacted a higher degree of proof, unwarranted in law, and on that account refused admission. The memorandum of the Assistant Commissioner General says:

"'The very fact that experienced officers have reached different conclusions on the point at issue in the case, and that another party has already been admitted to the United States as being identical with the person represented by the photo on court record No. 9527 (the habeas corpus case), is evidence that there is substantial doubt as to the correctness of the claims now advanced by the present claimant. The burden of proof is by law placed upon the applicant, and it is manifest that it has not been sustained'."

"In other words, the petitioner has been held to establish beyond 'substantial doubt' that his father is a citizen. This was plain and funda-

mental error in law. It was sufficient if the necessary facts were established by a fair preponderance of the evidence."

"Referring to a similar situation, the Supreme Court recently said:

" 'It is better that many Chinese immigrants should be improperly admitted than that one naturalized citizen of the United States should be permanently excluded from the country'. Kwock Jan Fat v. White, 253 U. S. 454; 40 Sup. Ct. 566; 64 L. Ed. 1010.

"On the evidence before the immigration tribunals the right of the applicant to admission was established. An order will be entered that the writ issue, and upon the return of it, unless the respondent desires to present further evidence, an order will be entered that the petitioner be discharged."

In finally submitting this matter we contend that the testimony of five different Chinese witnesses has been taken besides that of the father. The testimony of these five witnesses is all in exact agreement and accord; it is corroborated by the official records of the immigration department to the extent of showing the departures and arrivals of the five who have made trips to and from China; it also corroborates their place of residence in China as testified to by them. The testimony of these five witnesses is amply sufficient, even of itself, to conclusively establish the existence of the relationship of father and son between this appellant and Jang Sing, otherwise known as Jang Wey Ming. Viewing the testimony of the father alone, by itself, as given in the present administrative hearing, it is

in exact accord with all of the testimony supporting the existence of the relationship as claimed in this case; not only is this so, but all of his earlier testimony, excepting in the one instance before his departure for China in 1911, supports the relationship claimed. The most the Government can contend with respect to this earlier conflicting statement of the father is that it affects the father's credibility as a witness but, even so, that cannot affect the credibility of the remaining five witnesses who have testified in this case and the effect of whose testimony is to conclusively establish the existence of the relationship. We claim that there is little or no probative value to the supposed inconsistency in the father's earlier statement as a little reflection and investigation will abundantly confirm as we shall now attempt to show.

The father of this appellant went to China in 1908 under the name of *Jang Ah Fook*. This is established by his departure and return certificate from the immigration files which is an exhibit in this case. This is the essential trip to China upon which he was married and as a result of which trip to China and marriage this appellant was born. Of course, at the time of his marriage in China, in accordance with the Chinese custom, he was given a marriage name which is that of *Jang Wey Ming*. The father's "milk" or baby name, that is, the name given him upon his birth was Jang Fook. Here at this period of his existence we find the father with three names: first, the "milk" or baby name of

Jang Sing, second, the business name of Jang Fook, and third, the marriage name of Jang Wey Ming. The father next went to China upon a laborer's certificate. He filed an application to so depart in 1911. His name is given in that application as Gang Sing. He states that he had no other name and that he had never been to China (Exhibit D, pages 1 and 2). Both of these statements were totally and absolutely untrue, and must have been known to the immigration officials to be untrue, because they had before them the record of his trip to China but three years earlier, which he had made under the name of Jang Ah Fook. We might as well conclude that because the father stated in 1911 that he had no other name, and had never been known by any other name, and that he had never been to China, that these statements should be believed, but such is not the law; there is no probative weight or value to such a statement where there is the official record of the immigration service showing that he was known by another name, namely that of Jang Ah Fook, and that his statement of not having made an earlier trip to China was untrue when they had before them the actual record and documentary evidence of his trip to China three years earlier. The explanation with respect to this matter is not far to seek. These primitive old Chinese people believed that their status under the immigration law was fixed and determined for all time, as it was set forth in their regular certificate of residence, issued under the terms of the

Act of Congress of November 3, 1893 (28 Stat. p. 7), and the father having been so registered as a laborer believed, of course, that his status always had to remain that of a laborer in the eyes of the immigration authorities; that was the reason why he testified when applying for his laborer's return certificate that he was only known under the name of Jang Sing, which was the name given upon his certificate of residence, and he likewise denied ever having been to China because he had made that trip under a different name and under a different status. His object in denying his earlier trip to China was simply for the reason that he was then applying for a laborer's certificate and he was fearful of jeopardizing the issuance of that certificate and hence he denied his other name and denied his other trip to China. The fact of the inaccuracy of the interpretation is to be noted in the remaining portion of his examination. He was asked if he had any property in this country and he stated "No", and then immediately thereafter he goes on to state that he had $1000 due him in this country. This is only cited as an example patent upon the face of his examination at that time and place, as it is evidence to show that there was not a complete understanding between the Chinese interpreter and the father when he was applying for a laborer's return certificate. The father was next asked whether he had a wife or family in this country to see whether the existence of such could be used as a basis for his laborer's certificate, that

being one of the grounds provided by law for the issuance of such certificate. The father correctly answered these two statements that he had no wife or children in this country. Then near the conclusion of the father's examination he was asked whether he had a wife, or ever had a wife, to each of which questions he answered "No"; and in explanation of his testimony when he was finally confronted with these questions he stated he was under the impression the questions were limited to his status in this country, and he also explained that he supposed that all questions relative to his marital status were subject to the same limitation. This is a slight misunderstanding between the interpreter and the father which conclusively shows upon its face that there had not been an exact meeting of the minds. Such a supposed conflict, in view of the explanations offered, could have but little probative weight or value, particularly in view of the fact that there were presented two witnesses who lived in the vicinity of the father in this country and who went to China with him on the same steamer in 1908, and whose homes in China were in the immediate neighborhood of the father, and who were present at the time of his marriage, and who thereafter saw this appellant shortly after his birth and continued to see him a number of times until they left China to return to the United States. Certainly it would be a ridiculous thing to assert as a legal proposition that this supposed conflict in the father's earlier testimony could not

only discredit the father, but that it should also have the effect of impeaching the integrity of all of the remaining five witnesses who have testified in this case. It is respectfully submitted that such a legal conclusion would be unthinkable and not to be sustained under the firmly established principles of American jurisprudence. Certainly it is an absurd conclusion entirely lacking any evidence to support it, and manifestly an abuse of official discretion on the part of the appropriate administrative authorities to conclude that all of the witnesses have wilfully and feloniously perjured themselves in giving their testimony in this case, and that they are all members of a 12-year old conspiracy to land this 14-year old boy in the United States, and it is only upon such a conclusion and finding that there would be any warrant at all upon the part of the appropriate administrative authorities to reject the right of this appellant to enter the United States in the face of the evidentiary showing supported by official documents in the records of the immigration service which have been made in the appellant's behalf. Attention may be drawn to the fact that many of the cases cited refer to the rights where citizenship is involved; in other words, where the Chinese persons whose rights were at stake claimed American citizenship, whereas in the present case no such claim is advanced, the appellant being the 14-year old son of a resident alien Chinese merchant, but in this regard a case of controlling importance decided by this court is

that of a merchant's minor son, the case in question being reported as *Woo Hoo v. White* (243 Fed. 541), wherein the court, speaking through presiding Circuit Judge Gilbert, holds that not all discrepancies or inconsistencies are of probative value, the court holding:

> "Upon such a question, the opinion of a surgeon is believed to be of no greater value than that of a layman and in either case it has but little probative value to show a difference of age of only two years."

In this case the court goes on to criticise acts of unfairness by the trial inspectors which permeated their hearing and reports with unfairness, though they afterwards corrected their misstatements, such corrections did not repair the wrong that had been done fundamentally to the then appellant's case:

> "The error in the report was subsequently corrected; but, notwithstanding the correction the testimony of Woo Mun was disregarded by the inspector as adding nothing to the case."

And further the court goes on to hold:

> "Again, the opinion of the commissioner seems to have been influenced by the fact that the examining inspector believed the applicant to be Woo Sich Ngon, one of two boys who had applied for and were denied admission in 1910, as the sons of Woo Wai Gim. That belief was based upon the resemblance which the inspector found between the applicant and the photograph of Woo Sicj Ngon, taken in April, 1909, when he was 16 years of age, and the general

> resemblance between the applicant and Woo Wai Gim. The photographs of all these persons are in the record before us. We are unable to discover the resemblance which the inspector found. If there is indeed a resemblance, it is extremely remote, and is not sufficient, in our opinion, to constitute evidence. * * * "

This case is finally submitted in the firm belief that this court will not listen in vain to the earnest plea of this humble appellant, but will find from an examination of the entire record that he has not been accorded by the immigration officials at the port of entry and the Secretary of Labor at Washington a full and fair hearing and consideration of his case to which he is by law entitled, and that for this reason the judgment of the lower court should be reversed with directions to issue the writ of habeas corpus as prayed for.

Dated, San Francisco,
October 24, 1923.

Respectfully submitted,

GEO. A. MCGOWAN,
*Attorneys for Appellant.*

JOHN L. MCNAB,
*Attorney for Chinese Six Companies,*
*Of Counsel.*

No. 4053

IN THE

# United States Circuit Court of Appeals

For the Ninth Circuit

---

JANG DAO THEUNG,

*Appellant,*

vs.

JOHN D. NAGLE as Commissioner of Immigration for the Port of San Francisco,

*Appellee.*

---

# APPELLEE'S REPLY BRIEF

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JOHN T. WILLIAMS,
*United States Attorney.*

ALMA M. MYERS,
*Asst. United States Attorney.*
*Attorneys for Appellee.*

Neal, Stratford & Kerr S. F 36503

No. 4053

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---

## APPELLEE'S REPLY BRIEF

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### STATEMENT OF THE CASE.

Jang Dao Theung seeks admission to the United States as the minor son of a resident Chinese merchant known as Jang Sing, also known as Jang Wey Ming, whose mercantile status is conceded, the denial being based on the lack of relationship. The case was heard before the local Bureau of Immigration and on the 16th of October, 1922, the following letter was sent to the attorney for applicant, said letter being found on page 38 of Exhibit A:

IMMIGRATION SERVICE.

In answering refer to
No. 21405/7-24

Office of the
Commissioner
Angel Island Station,
via Ferry Post
Office
San Francisco, Calif.
October 16, 1922.

Mr. C. A. Trumbly,
617 Montgomery St.,
San Francisco, Cal.

Sir:

*In re*: JANG DAO THEUNG, Mer. Son, ex SS Nanking, 9-12-22.

You are hereby notified that I am unable to conclude that applicant is entitled to land, the claimed relationship not having been established to my satisfaction.

A period of ten days will be allowed for the introduction of additional evidence, provided notice thereof is filed with this office within five days. Review of the record will not be permitted during the time allowed for the submission of further evidence.

Respectfully,

EDWARD WHITE,
*Commissioner.*

Thereafter, and on October 18,1922, the Commissioner was advised by attorney for applicant that he had no further evidence to offer and requested that the case proceed to final conclusion as soon as

possible. (Exhibit A, page 39.) On the 18th of October notice of the denial of the application to land was given to applicant's attorney. (Exhibit A, page 41.) Notice of appeal was thereupon filed for and on behalf of said applicant. (Exhibit A, page 44.) On the 20th of October applicant's attorney was given full opportunity to review the entire record in the case to that date, as Exhibit A, page 45, signed by said attorney, establishes; therefore attorney for applicant was on that date apprised of the specific and particular grounds for denial as set forth in Inspector Mayerson's report found on page 34 of Exhibit A, as follows:

U. S. DEPARTMENT OF LABOR.

IMMIGRATION SERVICE.

| | |
|---|---|
| In answering refer to<br>No. 21405/7-24<br>Jang Dao Theung<br>Son of Merchant<br>SS Nanking, 9/12-22 | Office of the<br>Commissioner<br>Angel Island Station,<br>via Ferry Post Office,<br>San Francisco, Calif.<br>October 16, 1922. |

Commissioner of Immigration,
Angel Island, California.

Applicant, Jang Dao Theung, age 14, single, literate, destined to alleged father, Jang Sing alias Jang Wey Ming, a domiciled merchant of Fowler, California.

The alleged father claims to have arrived in this country in 1882 and to have made two trips to China since, one departing in 1906 and

returning in 1907 Ex SS Korea, the particulars regarding this trip as to month and day of arrival and departure were not ascertained by the examining inspector at Fowler, California, however, our records division reports that it is unable to locate any trip made by a Chinese of the same name given by alleged father in 1906-1907. Even if the alleged father made a trip to China in 1906 and returned in 1907 it would have been impossible for him to be the father of a boy born in 1909.

The statements now made by the alleged father regarding the trip he claims to have made in 1906-1907 are refuted by his own testimony of November 18, 1911, at which time he was an applicant for a laborer's certificate, and at which time he stated that he had not been to China since his first arrival in 1882.

The relationship now claimed is also refuted by the alleged father's own admissions when testifying in 1911, at which time he stated he was not then married nor had ever been married.

According to the evidence at hand the claimed relationship cannot exist and I recommend that applicant be denied admission to the United States.

H. MAYERSON,
*Inspector.*

Thereupon attorney for applicant advised the Commissioner under date of October 20, 1922, that the alleged father had erred in stating that he had departed in 1906 and that upon examining the files

for 1907 under the name of Chin Ah Fook, the records would establish the trip to China made by the alleged father essential to establish the paternity of applicant. (See Exhibit A, page 46.) The case was thereupon re-opened for the purpose of considering further evidence and on October 24, 1922, applicant's attorney was so advised and was requested to inform the Commissioner whether he had any additional evidence to submit. (Exhibit A, page 48.) In response to said notice under date of October 25, 1922, the attorney advised that he had no further evidence to offer, this, notwithstanding the fact that he was fully advised of the grounds of denial as set forth in the report of Inspector Mayerson herein above set out. A finding was thereupon made on the hearing on the re-opening of said case and the applicant was again denied admission for the reason that the claimed relationship had not been established. (Exhibit A, page 50.) Notice of said denial was given applicant's attorney, the record was again examined by applicant's attorney (Exhibit A, p. 47) and an appeal from said denial was taken. (Exhibit A, page 53.) A report of the then Commissioner of Immigration accompanying the record on appeal in this case was transmitted October 31, 1922, to the Commissioner General of Immigration from which we quote: (Exhibit A, page 55.)

U. S. DEPARTMENT OF LABOR.

IMMIGRATION SERVICE.

Refer to
No. 21405/7-24

Port of San Francisco, Cal.,
October 31, 1922.

RECD. BU. OF IMMIGRATION
NOV. 6, 1922
MAIL AND FILES

Commissioner General of Immigration,
Washington, D. C.

*In re* Jang Dao Theung:

There is transmitted herewith record on appeal in the case of Jang Dao Theung, age thirteen years (American), single, literate, student, subject of China, arrived ex SS "Nanking," September 12, 1922, destined to Fowler, California, denied admission by decision of this office on the ground that the relationship claimed between the applicant and his reputed father is not established.

Local counsel, C. A. Trumbly, will be represented before the Department by Attorney M. Walton Hendry, Evans Building, Washington, D. C.

The application was originally denied on two points—(1) the presence of the reputed father in China at a time to permit of his paternity was not shown; (2) in 1911, when applying for laborer's return certificate, the reputed father stated that he had never been married, whereas

the applicant's birthdate is now given as January 12, 1909. Upon reviewing the evidence in the case, the Attorney furnished information which, in addition to necessitating a reopening of the case, removed the first ground mentioned for denial. However, the second ground remains and it is on that point that the denial of the application rests.

The next sailings of the steamship line on which arrival occurred will take place on November 4 and 30 and December 2, 1922.

It is recommended that the excluding decision entered in this matter be affirmed.

The following exhibits are attached, which kindly return: #11316/182, 18537/16-2, 10280/-152.

EDWARD WHITE,
*Commissioner.*

PBJ: amt
incl. #18062

It was not until approximately a month later that an effort was made to submit additional evidence in the form of affidavits for consideration by the Department on appeal, (Ex. A, p. 57), notwithstanding, according to counsel's own contention as found on pages 26 and 27 of his brief, the review on appeal is restricted to the evidence which was received and considered by the Board of Special Inquiry at the port of entry, citing Sec. 17, Act of February 5, 1917, and Rule 3, Sub. 2, 3, 4, of Chinese Rules and Regulations.

It is thought advisable to set these matters forth in such detail for the purpose of refuting the erro-

neous statements made in the opening brief of appellant to the effect that no opportunity had been given applicant or his counsel to submit, prior to the final determination by the local authorities, evidence to overcome the prior adverse statements of the father made in 1911 to the effect that at that time he was not married, had never been married, had not made a trip to China since his first arrival in the United States—all of which statements were made under oath—and which, if true, preclude Jang Sing from being the father of the applicant, who admittedly was born in 1909; (appellant's brief, pages 2, 3, 4 and 5 thereof,) and also for the purpose of explaining the remarks of the Department found in their first decision under date December 21, 1922, partly set forth herein as follows:

> "*Unfortunately, the officials who examined the alleged father,* did not question him regarding his prior testimony, and therefore the record contains no suggested explanation from him. Local counsel have requested that the case be reopened for the purpose of examining him on the point and also in order that the additional witnesses may be questioned. Inasmuch as the alleged father testified unequivocally, under oath, in 1911, and the attorney at the port, in the present case, *who had an opportunity to, and did, review the record* made no request for examination of the alleged father regarding his 1911 testimony, it is not believed that disposition of the case should be delayed for the purpose, particularly as the alleged father is in Los Angeles and is not available for examination at Angel Island.

> As to the affidavits, they have been carefully noted by the board, which has reached the conclusion that, presuming that the affiants will testify strictly in accordance with their affidavits, such testimony will not be sufficient to overcome the prior sworn statements of the alleged father."
>
> Exhibit A, p. 64 and 65.

and their telegram of December 29, 1922, which is as follows:

> "28EXBR 848A 92 325DEC29'22
>
> DX WASHINGTON DC DEC 29 1922
> IMMIGRATION SERVICE
> SANFRANCISCO
>
> REPRESENTED TO DEPARTMENT THAT COURTS DECISION CASE LOW JOE PERTINENT AND APPLICABLE CASE JANG DAO THEUNG RECENTLY EXCLUDED IF CASES SUBSTANTIALLY SIMILAR STAY DEPORTATION JANG DAO THEUNG PENDING FURTHER ORDERS AND FORWARD COPY LOW JOE DECISION CONSULT WITH UNITED STATES ATTORNEY AS TO ADVISABILITY APPEALING LOW JOE DECISION IN CONSIDERING JANG DAO THEUNG CASE DEPARTMENT GAVE FULL WEIGHT TO AFFIDAVITS OF PROPOSED ADDITIONAL WITNESSES, BUT DECLINED TO DELAY CASE TO TAKE

THEIR TESTIMONY WITNESSES APPARENTLY WERE AVAILABLE WHEN CASE ORIGINALLY HEARD BUT NOT BROUGHT FORWARD UNTIL CLOSED AND RECORD FORWARDED TO WASHINGTON

WHITE"

Exhibit A, page 80.

Of the contents of this telegram counsel for appellant herein was fully advised, the same having been sent at the expense of his representative in Washington, and the same having been set forth and made a part of his letter and argument to the local Commissioner here under date of January 4, 1923, (Exhibit A, page 91, 90-82). So that when a request was made to re-open the case, which request was granted under date January 11, 1923, counsel for appellant herein was fully aware of the position of the department in the matter, and knew well the basis therefor. Not only is this so but the re-opening of the case was made not by reason of the representations of Court Officer P. A. Robbins to the Department at Washington, because the letter of the Court Officer was not communicated to the Department at Washington prior to the order for the re-opening of the case, as appellant would have it appear. (Page 13, 14 of Appellant's brief herein). The only communication in that regard was the wire from the Commissioner here in response to the wire from the Department sent at the request of appellant's Washington attorney hereinabove set

out, which wire is set out in full at pages 70 and 69 Exhibit A, and which is in the following language:

1923 JAN 11 AM 2 36

NC

24 165 NL 1/71

F SAN FRANCISCO CALIF 10

IMMIGRATION BUREAU

WASHINGTON DC

REPLYING PARTHIAN YOUR TELEGRAM DECEMBER TWENTY-NINTH CONCERNING APPEAL CASE JANG DAO THEUNG *DECISION OF COURT IN CASE MENTIONED THEREIN NOT THOUGHT APPLICABLE* STOP OUR COURT OFFICER INVITES ATTENTION TO FAILURE OF EXAMINING INSPECTOR IN THE SOUTHERN DISTRICT TO CONFRONT ALLEGED FATHER AT THE TIME OF HIS EXAMINATION IN FOWLER OR AT ANY TIME THEREAFTER WITH SAID FATHER'S NINETEEN ELEVEN DECLARATION TO THE EFFECT THAT HE WAS NOT THEN MARRIED STOP

INSTRUCTIONS TO SO CONFRONT WITNESSES WITH PREVIOUS TESTIMONY IN CASES OF THIS CHARACTER CONTAINED IN BUREAU LETTERS SEPTEMBER TWENTIETH AND OCTOBER FOURTEENTH NINETEEN NINETEEN NUMBER

FIVE FOUR SIX NINE SEVEN SUB TWENTY THREE STOP IN VIEW FATHER NOT BEING CONFRONTED WITH HIS PRIOR DECLARATION AND THE INCIDENT PROBABILITY OF HABEAS CORPUS PROCEEDINGS BEING INSTITUTED COURT OFFICER SUGGESTS REOPENING OF THE CASE FOR THE TAKING OF THE EVIDENCE OF SUCH ADDITIONAL WITNESSES AS THE INTERESTED PARTIES MAY DESIRE TO SUBMIT AND CONFRONTING OF ALLEGED FATHER WITH HIS PRIOR DECLARATION AND THIS OFFICE ACCORDINGLY SO RECOMMENDS

WHITE

EXHIBIT "A", p. 69-70.

It appears that the letter of P. A. Robbins, Court Officer, had not been communicated to them, (it having been written on January 9, 1923, and the order for re-opening having been made on the 11th) the only communication made from the local department being the wire of January 11th hereinabove set forth to the effect that the Low Joe decision not thought applicable. It does appear that the contention made by the appellant's counsel as set forth in the letter of their Washington counsel found on page 68 of Exhibit A, and the letter of local counsel for appellant incorporating therewith the decision of Judge Dooling in the Low Joe case, found in Exhibit A, pages 91 to 82, inclusive, was adopted by the department in granting a re-hearing

and re-opening of the case, namely that the Low Joe decision, cited by them, to the effect that an administrative hearing was unfair if the witness had not been confronted with prior contradictory statements, controlled the case. The language of the Department in ordering a re-opening is worthy of notice. The decision is set forth at page 74, Exhibit A, in which the following language is found:

55245/166 SAN FRANCISCO, Jan. 11, 1923.

*In re: Jang Dao Theung.*

This case comes before the Board of Review for consideration of a request for reopening.

Attorney Hendry interested. No oral hearing.

The record contains the affidavits of two persons who claim to have a knowledge on the essential facts. These affidavits were considered when the case was previously before the Board of Review, and the conclusion was reached that it would be necessary to delay disposing of the case until the testimony of the affiants could be taken, provided the affidavits were considered as embodying substantially what the affiants would testify to. Counsel also pointed out in his brief that the immigration officials, in examining the alleged father, had failed to question him regarding his testimony of 1911, during the course of which he made statements inconsistent with the claims of paternity now advanced. This point likewise *was* not regarded as of sufficient importance to

call for the return of the record at San Francisco.

Counsel has invited the attention of the Board of Review to a recent decision of the District Court at San Francisco in the case of a Chinese named Low Joe whose exclusion was directed by the Department. In that case in which there were numerous material discrepancies, the Department directed reopening after one writ of habeas corpus had been dismissed, for the purpose of receiving additional evidence. The examining officers at Angel Island during the course of the supplemental hearing in the Low Joe case, failed to examine him regarding the discrepancies in the record as it was originally made up, and the court held this to be unfair. This impresses the Board of Review as somewhat remarkable, but the United States Attorney at San Francisco does not believe an appeal to be advisable, and it is, therefore, likely that the District Court, if the case of Jang Dao Theung were to come before it, would, reasoning along lines similar to the Low Joe case, hold this hearing also *unfair because the alleged father was not questioned regarding his* 1911 *testimony.* For this reason it would seem to be advisable to reopen the case, and as long as delay is now inevitable, there is no real reason for not also taking the testimony of the additional witnesses.

The Board of Review recommends that the case be reopened in order that the testimony of the additional witnesses may be taken, and also, in order that the alleged father may have

an opportunity to submit such explanation as he may be advised of his 1911 statements.

A. E. KEITZEL,
Acting Chairman, Secy. & Comr.
Genl's Board of Review.

CEB:hms

So Ordered:
ROBE CARL WHITE,
Second Assistant Secretary.

EXHIBIT "A," p. 74.

And of this decision of the Secretary, the local Bureau and counsel for appellant were both advised on the 12th of January, 1923, (Exhibit a, page 75 and 76).

Certainly no legitimate complaint can be urged by counsel for appellant that the Department granted their request, and cited as a basis for their decision the case presented by themselves as the reason for granting the same. That the Department sought to meet the standards of fairness dictated by the decisions of the Court in like cases, no blame can be charged to them for so doing even though were their own judgment to control, the case would not present to their view an element of unfairness.

A re-hearing was thereupon ordered and all the witnesses that appellant sought to present were fully heard. The affidavits theretofore submitted to the Department on appeal were returned with the complete file to the local office. The alleged father was confronted with his prior conflicting statements and

asked to give his explanation thereof which he did. The same is found on page 119, Exhibit A. His explanation is to the effect that he did not testify that he was not married in 1911. If the record so appears it could only be explained by reason of the fact that "They were talking about having a family in the U. S. and I supposed that all the questions referred to whether I had a family in the U. S. It was a misunderstanding on my part."

Also at the top of page 118, Exhibit A, he accounts for it in this wise: "The interpreter seemed to take a dislike to me and spoke very gruffly to me, didn't give me an opportunity to answer questions fully and didn't always make himself plain. It may be that he misunderstood me, but I know that he gave me the wrong impression and led me to believe that he only referred to whether I had a family in the U. S."

In answer to the attempted explanation of the statement of 1911 above set forth, I am setting forth herewith the complete statement of Jang Sing under date November 18, 1911, found in Exhibit D at page 1 and 2 thereof, which refutes absolutely the contention that the witness was confused by the interpreter, and also that he was led to believe in answering the question propounded to him at the close of his examination respecting his mariage, that he was being questioned respecting the marriage in this country only. The explanation offered by counsel in their presentation of their case before the department as well as in their brief filed herein at page 43 thereof is that the state-

ments relating to his marriage were totally and absolutely untrue, and in addition that the statements that he had no other name and had never been known by any other name, and that he had never been to China, were likewise untrue. The reason for so stating, however, is said to be that the witness believed his status under the immigration law was fixed and determined for all time as set forth in his regular certificate of residence, and he having registered as a laborer believed, of course, that his status always remained such in the eyes of the immigration authorities. This is the reason why he testified that he was only known under the name of Jang Sing, the name appearing on his certificate of residence; notwithstanding the fact that in 1907 this primitive old Chinese obtained from the same immigration authorities the status of a Chinese merchant in the short period of four years *prior* to the examination in question. Likewise they would have you believe it was the reason for denying his marriage, and this is held to be only a "supposed conflict in the testimony of this witness." In view of the explanations offered there is admittedly little or no probitive weight or value to be given any of this witness' testimony. Of course it does not impeach him as a witness. Of course it does not say that his entire testimony of 1911 admittedly is false from beginning to end. Another explanation of the father's 1911 testimony is set forth in the argument advanced by counsel for applicant before the Department of Labor that he gave answers to the questions as he did for the purpose of suppressing his trip in the status

of a merchant in 1907 and 1908 because if "he had disclosed his marriage in China at that time that would naturally have superinduced a barrage of questions." The 1911 testimony of the alleged father in full follows:

UNITED STATES IMMIGRATION SERVICE
CHINESE DIVISION

FRESNO, CALIFORNIA, NOVEMBER 18, 1911

Ser. No. 830
Gang Sing
Labor Departing
See Yip dialect.

W. H. Webber,
Inspector.
Chin Jack,
Interpreter.
Hermansen,
Stenographer.

Interpreter originally speaks See Yip.

Applicant Sworn.

Q. What are your names? A. *Gang Sing; no other name.*

Q. Were you ever known by any other name? A. No.

Q. How old are you? A. 48.

Q. What year were you born? A. TG 3, Seuk Ham YPD.

Q. When did you first come to the United States? A. KS 8.

Q. Where do you live in this country and what is your occupation? A. *Had a restaurant and sold it;* name of restaurant Chung Hing.

Q. When did you sell it? A. *Feb.*

Q. What have you been doing since then? A. Cooking oil camp of Standard Oil Company, Mallon, Cal.

Q. Then you have been away from Reedley since Feb.? A. Yes.

(Applicant registered under certificate of residence No. 91679 Jan Sing, occupation cook, residence Bakersfield, dated Bakersfield, March 19, 1894, photograph of this applicant and also the description tallies with the certificate.)

Q. How old were you when you registered? A. Do not remember.

Q. *Have you been to China?* A. *No.*

Q. How long did you live in Reedley? A. *Four years.*

Q. Did you have a restaurant all the time you were there? A. *Three years.*

Q. How much did you sell your restaurant for? A. $340.

Q. How much did you make during the three years you were there? A. Averaged $1100 a year.

Q. How much did you make while you were cook at the oil camp? A. $60 per month.

Q. When did you quit work at the oil camp? A. Latter part of August present year.

Q. Have you been doing anything since August? A. Cooking for threshing machine outfit.

Q. How much did you make a month working for them? A. $2.50 per day.

Q. *Have you a family in this country?* A. *No.*

Q. Have you any property in this country? A. No.

Q. Does anyone owe you any money? A. Jung Hing Ying; farmer Reedley, California.

Q. How far from Reedley? A. *One or two miles.*

Q. Does he own a farm? A. No.

Q. Who does he farm for? A. Leases.

Q. How large a farm? A. 40 acres.

Q. How long have you known him? A. Ten years.

Q. Where did he live when you first knew him? A. Fresno.

Q. How long has he lived at Reedley? A. *Six or seven years.*

Q. How much does he owe you? A. Over $1,000.

Q. How long has he owed it to you? A. *Nearly four years.*

Q. How did you loan him the money? A. Different times.

Q. Why did he borrow the money from you? A. Investment in farm and also to buy fruit.

Q. Has he given you any note for the amount he owes you? A. Only a book account.

Deposits.

| | | | |
|---|---|---|---|
| (June 2-08) | KS 34-5-5 | 400. | |
| (July 4-08) | 6-7 | 150. | |
| (June 29-09) | ST 1-4-29 | 300. | |
| (July 12-09) | 5-25 | 150. | |
| (July 30-10) | ST 2-6-24 | 350. | 1350. |

Withdrawals.

| | | |
|---|---|---|
| KS 34-10-9 | 100. | |
| ST 1-10-20 | 100. | |
| 2-8-15 | 50. | |
| 9-20 | 50. | 300. |
| Balance due applicant | | $1050. |

Q. *Where was he when you let him have this money?* A. *Reedley.*

Q. Whereabouts? A. Sue Lee Co.

Q. Did you send him any money when you were in Bakersfield? A. No.

Q. Is he going to pay any of it back before you go to China? A. No.

Q. *Have you enough money to go to China and return?* A. *Yes.*

Q. *Are you married?* A. *No.*

Q. *Were you ever married?* A. *No.*

Q. Have you an interest in any mercantile establishment? A. No.

Before leaving the subject of the 1911 testimony I desire to direct the attention of the Court to other discrepancies affecting the credibility of this witness.

He testifies therein that he had resided for four years in Reedley; during said time he had a restaurant for a period of three years; that he sold the restaurant in February of 1911, and that after that time he worked as a cook for different concerns; that testimony discloses that he was, according to his then statement in Reedley in 1907 and 1908. Further, he testifies that he had owing to him from a farmer near Reedley the sum of over a thousand dollars, money which he lent the farmer at Reedley. He substantiated this by introducing a book account which account is set out in full in the record. The American reckoning is set opposite, in brackets, the dates specified in the book account the money was advanced in Reedley to the debtor. It is to be noted in this regard that the first deposit was made in June 1908, and the second in July 1908, at a time when witness now contends he was in China, for he claims to be one and the same person who left the United States on November 16, 1907, and returned on September 27, 1908, under the name of (Jeng) Ah Fook, Ex. B herein. In this connection it is noted that Exhibit B discloses Jang Ah Fook as a merchant, a member of the firm known as Hong Sing Kee Co., that he was a bookkeeper and salesman, (Exhibit B, pages 2, 2A) in said firm and had been a member of said firm for five years preceding his trip in November, 1907. (Exhibit B, page 3.) Furthermore, it appears that one Jung Sing, under which name the witness' record appears in the 1911 case, is also a member of said firm, (see line 24, page 1, Exhibit B); note also that the debtor of Jung Sing

in 1911 was sworn and testified and produced a book with accounts in it in exact accord with that produced by the applicant Jung Sing to support his right to depart as a laborer having $1000 in debts owing to him in this country. (Ex. D page 3.)

The study of this 1911 testimony has been made for the purpose of showing that the alleged father is wholly unworthy of credit, and has in fact by his present claims impeached himself before the Department. His counsel admits he perjured himself in 1911, but why then assume that he has not perjured himself in 1922 and 1923? They must concede likewise that his witness in 1911 perjured himself—why then assume that the witnesses produced by him in 1922 and 1923 are telling the truth?

It is of interest to note that the alleged father at no time whatsoever answers to the name of (Jang) Ah Fook. In Exhibit A, at page 120, under date January 29, 1923, answering the question: "State all the names by which you are known," he answers, "Jang Sing, Jang Wey Ming, married name." Exhibit A, page 29, under date October 2, 1922, he is asked the same question, and he gave the same answer as given on January 29. In 1911 he likewise answered the question "What are your names" in this wise: "Gang Sing, no other name." Now, in 1907 the person departing then did so under the name of (Jang) Ah Fook, and the affidavit made by two white persons to establish the mercantile status of Ah Fook certifies "that said Ah Fook is

a merchant and active member of the mercantile firm of Hong See Kee, and that the said Ah Fook has for three years last past been a merchant and resident of Fresno, and after investigation are fully convinced that the said Ah Fook is a bona fide merchant," and then they set out the members of the firm, naming five persons, including Ah Fook as one, and Jung Sing as another. It would seem therefore the contention of Jang Sing that he is one and the same person as Ah Fook would require him to say in answer to the question, "What are your names, and what names are you known by" that he was known by the name of Ah Fook, whereas at no time has he so testified; in fact, his first testimony in the present case, found at page 29, Exhibit A, gave his departure for China in 1906 and his return therefrom in 1907, without making mention at all of the name Ah Fook, and it was not until the case was first re-opened by the local office at the request of his counsel that the name Ah Fook was suggested under which to look for a record of the earlier and essential trip. Nor would it seem to be an answer to this situation to show, as counsel for applicant seeks to do, though there is nothing in the evidence to support it, that the name Ah Fook was a business name of this witness, for the business was conducted under a firm name, namely Hong Sing Kee Company, and the partnership list included the names of the members none of which were identical with the firm name. (Exhibit B, pages 1 and 3.)

Taking up the testimony of each of the five witnesses produced by the alleged father in behalf of the applicant herein, let us examine whether or not these witnesses by the record in this case are worthy of credit. The identifying witness Wong Lim Young on the 4th day of February, 1922, made an affidavit, found on page 1 of Exhibit A, in which he states "that this affiant last returned from China Ex S. S. "Manchuria" April 19, 1914; that while in China affiant saw Jang Dao Theung, the lawful minor son of Jang Sing, and is able to identify him." This affidavit was prepared by counsel for applicant and was submitted in his behalf by his counsel. On page 23 of Exhibit A is found the testimony of this identifying witness and therein he states that he went to China in 1918 and returned in September, 1919, and that he had been directed by Jang Sing to see his family there, and that he saw applicant in a market there in a village some little distance from applicant's home village; all of which, of course, is in direct conflict with the statement made in his affidavit.

The second witness offered to support the contention that the alleged father was in fact married when he made the 1911 statement to the countrary is Hong Gong Chong, (Ex. A, page 108) who testifies under date January 29, 1923, as follows:

> "I made two trips to China, went last time in November, 1921, on the Golden State, returned in October, 1922, on the S. S. China. I went

to China when I was three years old, returned in 1896. I cannot identify it (the son's photograph) because I do not know that I ever saw him. * * * I did not visit his (Jang Sing's) home, but I met his wife in the streets of their village (p. 107) * * * She told me that her eldest song Jang Dao Theung had come to the United States and she had not heard whether he was with his father, and she asked me to find out about it as soon as I got here. * * * Applicant was in his native village when I got to China. * * * I did not know that this boy was coming to the United States or I would have gone to see them before he came. I promised Jang Sing that I would try and see his family while in China. Applicant came to the United States on the Nanking about one month before I came back on the China in October, 1922." (Page 106.)

He was questioned regarding the contents of the affidavit signed by him found in Exhibit A, page 95, and he stated he understood the contents of this affidavit when he signed it. The affidavit states as follows:

"*A great many* years ago your affiant had *visited his home and seen his wife and seen this applicant as a baby. That upon intermediate visits* to China made by your affiant he has known and heard of the family of Jang Sing, and has known during all of these years that he had a wife living in the Shuk Hom Village and that he had two children, this applicant and a younger brother. That your affiant has not *seen the wife of Jang Sing or this applicant for a number of years,* but

knows from hearsay and conversation of fellow villagers of Jang Sing that his wife and two children continually resided in that village, and *occasionally when your affiant was in China and visited around* the different villages *he has seen the wife and children,* although he did not personally call *upon them within recent years so that he could positvely* identify this applicant, but the fact that the said Jang Sing has a wife in China and children there, is now, and has been known to your affiant for upwards of ten years last past."

The only explanation the witness gave when questioned respecting these conflicting recitals in the affidavit and his testimony was that the lawyer misunderstood him and made the paper out wrong. That was error on his part through a misunderstanding; and this is one of the affidavits that was procured by applicant's present counsel for the purpose of obtaining a re-opening in this case. It is to be noted that the affidavit does not in any respect conform to the testimony of the witness or the records of the Immigration office respecting the trips to China made by this witness. He had not visited China according to his own testimony from 1896 to 1921, so that all that about visiting the home of Jang Sing's wife and seeing this applicant as a baby; the intermediate visits to China spoken of therein; that affiant has not seen Jang Sing nor this applicant for a number of years, but occasionally when your affiant was in China and visited one of the villages he has seen the wife and

children of Jang Sing, although he did not personally call upon them within recent years," is all humbug and nonsense, and there is not a word of truth in it. Giving full credence to his testimony, the most that can be obtained from it is that he met a woman in the streets of Shuck Hom Village, whose son was seeking admission to the United States, and she had not heard whether he was with his father and she asked him to find out about it.

Another witness produced was Wong Bing Sing, whose testimony was given the same day as the last-mentioned witness's, and is found in Exhibit A, page 116. This witness likewise has no personal knowledge respecting the relationship of the applicant and his alleged father. This witness states:

"I do not know his son. I never saw him."

He claims on page 115 that he addressed and mailed to China certain letters for Jang Sing. They were not, however, addressed to the wife of Jang Sing nor were they sent to her village. They were addressed to Ching Choon Lun Company, Hong Kong, China, and they were sent by that Company to his wife in China, which is certainly first-hand information and bears out fully the claim that the alleged father sent money through this witness to his wife and family in China. As a matter of fact, upon Ah Fook's return to this country in 1908 he was to all intents and purposes a merchant with an established business in Fresno, California. Why, therefore, go to this witness Wong Bing Sing, a

member of the Duck Lee Company in Fesno, California, to transfer moneys to a firm in Hong Kong, China, for transmission to his alleged wife? Considering this witness's testimony, it is worth while to refer to the affidavit submitted by him, found in Exhibit A, page 97, in which he states in part as follows:

> "That your affiant *for many* years last past has handled the financial affairs of Jang Sing in the matter of transmitting money for him, and that your affiant has for *eight or nine years last past* received money from Jang Sing and transmitted the same to his wife in China, the said wife's name being Som Shee and her residence in Shuk Hom Village, Yen Ping District. That your affiant personally knows that Jang Sing is married, and has been during all the years in question, because of his making his yearly remittances through your affiant's store, *to his wife at their home in China* for her support and maintenance and that of their two sons."

Of course, during four of the eight or nine years last past Jang Sing himself has been a merchant actively engaged in business in *Fowler,* California, see Exhibit A, pages 12 and 15, and is a bookkeeper for the firm, and has been since February 1, 1919, yet notwithstanding that fact the witness Wong Bing in the city of Fresno has attended to the transfer of the yearly remittance for Jang Sing of Fowler, Calif., to the latter's wife in China, or rather to a firm in Hong Kong, China.

There remains the testimony of two witnesses to consider: Sam Yick, also known as Jang Lou Wong, and his wife, Lee Jen. These two claim to have personal knowledge of the marriage of Jan Sing to the alleged mother of the applicant. Their testimony is to be found in Exhibit A, page 114 and 111. Sam Yick and his wife had passage on the same boat as Ah Fook in November, 1907, and returned in April, 1910.

Sam Yick has not been to China since. (Exhibit A, page 114.) His home in China is 4 or 5 Li from the home of the applicant herein. (Page 113, Ex. A.) He recalls being present at the wedding, but never visited the home of Jang Sing thereafter. (Pages 112 and 113, Ex. A.) Claims to have been in China when the child was born and saw him frequently up until the time he was two years of age, but would not now know him.

Lee Jen testifies that she, too, was at the wedding of Jan Sing and the mother of applicant, and that she saw the applicant first when he was a few weeks old, and that she visited the home of applicant while in China.

In this connection it is interesting to refer to the affidavit executed by these two witnesses on the 14th day of November, 1922, found in Exhibit A, pages 99 and 98, wherein Sam Yick states that he is of the same clan as Jang Sing and that during the three years of the residence of your affiants in China they frequently *visited the home* of the said Jang Sing

also known as Jang Weh Ming, and *saw him and his wife there upon many and frequent occasions.* This affidavit also was prepared by their own counsel and in respect to the matter of visiting the home of the wife is in conflict of the testimony of Sam Yick given before the Department. Throughout the testimony of all of these witnesses it nowhere appears that any of these witnesses knew this applicant as Ah Fook. There is something also worthy of note in regard to the testimony of Lee Jen and her husband Sam Yick which is to this effect, Exhibit A, page 110, under date January 28, 1923, Lee Jen states:

> "I have three children, two sons and one daughter; oldest son is Jang Fun, about 30 years old, living in Bakersfield; next son is Jang Yick Gam, 14 years old, living with me in Bakersfield; my young daughter Jang Oy, four years old, living with me in Bakersfield. My oldest son is my stepson. He is the son of my husband by his first wife."

This statement of the wife concerning her family is in direct conflict with the representations of the husband respecting his marital status and his children found in Exhibit E, at page 12, wherein the father, under date of April 22, 1910, states he has never had but one wife and that his family consisted on that date of two children, twin boys, Jung Yuck Gom, 4, and Jung Yick Ngon, 4 years of age; and Exhibit E, page 5, under date of November 4, 1907, in which the father under oath testifies that he has

no sons or daughters. Also, Exhibit F, page 15, in which the same testimony is found, and the testimony of Lee Gan under date of April 22, 1910, found in Exhibit F, page 14, to the effect that she has but two children, twin boys, born during a visit to China, from which she was then returning. Notwithstanding the foregoing testimony, Jang Fun, the alleged step-son of Lee Jen, obtained admission as the son of Sam Yick by a former wife, and is now residing in Bakersfield, as appears from page 1 of Exhibit E, as well as from Lee Jan's testimony, page 110 of Exhibit A.

It is believed that the full presentation of all the facts in this case is in and of itself sufficient to justify the decision of the Department excluding this applicant from admission to the United States, and it is likewise believed that the full presentation of facts disposes of the points of law presented and argued by counsel for appellant. We, therefore, wish to give only a very brief consideration to each of the points raised in appellant's brief in the order they are presented.

## I.

## QUESTION OF PROCEDURE.

The sole contention of appellant is that the failure to question the alleged father respecting his 1911 testimony at the original hearing before the port officials, the original denial on the first appeal by the Secretary of Labor at Washington and his

expression of opinion at that time respecting the failure so to examine the alleged father respecting his adverse statements made in 1911 indicates that the re-opening when ordered upon their request therefor and by reason of authority submitted by the appellant, was nevertheless a mere naked procedure done not for the purpose of affording applicant a proper and fair consideration of the case presented anew, which he had a right to expect upon the re-opening granted to him, but for the sole purpose of correcting the record and preventing the applicant from obtaining a hearing *de novo* before a judicial tribunal. There is nothing whatsoever in the record to sustain the inference drawn by counsel for appellant that the Secretary of Labor, in directing a rehearing, was actuated by other than the highest motives and in conformity with his best judgment and proper practice. The order directing a rehearing was made and was based upon the Low Joe case, presented by counsel for appellant as the ground for asking the same. A full and fair hearing was had before the local authorities. At no time whatsoever were any witnesses sought to be presented denied a hearing, and all the reference in appellant's brief respecting a situation where witnesses were denied the right to be examined, has no bearing whatsoever on the question involved in this case. Our answer upon the point raised by appellant that the department, first improperly refrained from questioning the alleged father with reference to his 1911 statement

respecting his marriage, and secondly, with reference to the rehearing awarded by reason of such failure and the claim that the rehearing was awarded not in good faith but with *mala fides* and merely for the purpose of making a record apparently good against attack in the courts, is that from the outset and before the local authorities had concluded their case the applicant and his counsel were advised of the existence of the 1911 statement, and that the same was the controlling reason for denying his admission; that an opportunity was given after such knowledge to present further evidence; that none was so presented and no explanation sought to be made for the said 1911 statement at that time; that on appeal the question was raised and additional evidence, in the form of four affidavits, was submitted for the purpose of obtaining a rehearing wherein an explanation could be made and evidence to overcome the damaging admission presented; that the department considered these matters, but considered that the applicant had had an opportunity in due time to have presented the evidence now sought to have introduced, and therefore denied the appeal; that upon the earnest solicitation of counsel for appellant and the consideration of the case presented by them they deemed that notwithstanding their own judgment as theretofore made that the hearing was in all respects fair, they must bow to the ruling of the court on the question of fairness as enunciated in the Low Joe case presented by counsel for appellant and in so doing

acceded to the request of counsel and awarded a rehearing. So that it is thus made clear that the Secretary, in considering the action of the courts and in his attempt to conform thereto, did what his duty as an official required him to do. It is contended that there was no unfair treatment of the applicant as disclosed by the record or fairly to be inferred therefrom. On the contrary, the record shows that the Secretary's action in re-opening the case shows his desire to accord the applicant fair treatment as dictated by the decisions of the courts in like cases.

The general presumption of law is that in absence of *proof* to the contrary credit should be given to public officers who have acted *prima facie* within the limits of their authority for having done so with honesty and discretion, or as expressed in the maxim, *omnia praesumuntur rite esse acta.*

1 *Greenleaf Ev.* Sec. 38;

*Schell v. Fauche,* 138 U. S. 562; 34 L. Ed. 1040;

*Hayes v. U. S.,* 170 U. S. 637; 42 L. Ed. 1174;

*Sabariego v. Mayerick,* 124 U. S. 261; 31 L. Ed. 430;

*United States v. Ross,* 92 U. S. 281; 23 L. Ed. 707.

An inspection of the record does not show that applicant was denied any substantial right to which he was entitled either under the law or the rules and regulations in such cases made and provided,

and it is now well settled that in the absence of such showing the petition should be denied.

*Chin Yow v. U. S.,* 208 U. S. 8.

It is true that in the present case the alleged father was not immediately confronted with the prior statement. Before the case was closed, however, the alleged father was given full opportunity to explain the conflicting statements. The attorney for the appellant claims that the case of the applicant was prejudiced because the alleged father was not immediately asked to examine his prior statement at the time he first appeared before the port officers. It is the contention of the government that he had this opportunity so to do in the first instance or rather before the case went to Washington, but be that as it may, the explanation of the alleged father was received and considered during the course of the hearing and he had full and ample opportunity to explain. Whether the explanation was made early or late did not affect the substance of the explanation.

It is well settled by the decisions that informality of hearings by immigration officers does not establish unfairness. Administrative hearings from the very nature of the investigation must be of a summary character.

*Chin Yow vs. U. S.,* 208 U. S. 8;
*Sibray v. U. S.,* 227 Fed. 1.

They need not be conducted according to procedure

and rules of evidence applied by the courts and where essential justice is attained the decisions hold that the courts will not interfere with the findings of administrative officers. All that is required is to establish the truth by fair and reasonable means.

*Fong Yue Ting vs. U. S.,* 149 U. S. 698;
*Ex Parte Chin Loy You,* 223 Fed. 833;
*In re Madeiros,* 225 Fed. 90.

It is stated by counsel for appellant that it is now and has been for some time the policy of the immigration service where prior adverse statements exist as to marital status or paternity inconsistent with the statements developed in the case under examination to require that the immigration officers at the port of entry should regard the prior statements as a bar which would preclude the existence of the relationship claimed to exist at the later date.

In this counsel is in error. No such policy has been promulgated or followed by the port officers. While the question presented in this case has arisen in other cases both before the department and the courts, there are no instructions expressed or implied which have for their purpose the influencing or controlling of the decisions of subordinate officers at the ports of entry.

Mr. M. Leland Hendry, attorney for the present applicant, who represented the applicant before the

Secretary of Labor, bears witness to this in his letter to the Department of December 23, 1922, (Exhibit A, page 68), wherein he states:

> "In these prior statement cases, the Department has always taken the ground that where the preponderance of the evidence was that the statement was incorrect, the said statement in that event will not be considered; in other words, preponderance of the evidence will govern on any question of fact, and as I understand it that is the present rule of the Department and has always been."

Furthermore, the Department is on record in the case of *Chang Wo*, Bureau #54005/41, in which the appeal was sustained by the Department on September 15, 1915. The case was one concerning prior declarations and it was stated in the decision sustaining the appeal as follows:

> "This case, like that of Lim Hung Sam (54005/31) is referred to me by the acting Secretary (before whom it came originally) because it involves the Department's policy relating to misstatements by alleged fathers at prior examinations. In the present case, as in the other, the applicant is confronted with a prior statement of his alleged father, which, if true, makes it impossible for the applicant to be a son of a person here claiming to be his father. As I have stated in the Lim Hung Sam case, *it is not the policy of the Department to regard these prior statements as estoppels.* When, as in both these cases, the father has testified years ago that he was then unmarried, and now testifies to being the father

> of an applicant born before his prior testimony, he is not precluded from showing that he was in fact married at the time he swore he was unmarried. While his prior testimony is a fact to be considered in arriving at a conclusion it is not an absolute bar to the admission of his alleged son (53560/116). * * * * *
>
> LOUIS F. POST,
> *Asst. Secretary.*"

The conclusion is therefore reached that there is no valid ground of objection to the procedure followed in this case in any particular.

Considering now the second question raised that there was a manifest abuse of discretion in considering the evidence, a fundamental misconception of the basic rules of evidence, we respectfully submit it is our belief that were this honorable court to pass upon the evidence submitted in this case, they would undoubtedly come to the same conclusion as the port officers did whose decision was upheld by the Secretary of Labor on review of the same.

It is conceded by counsel that there is a latitude of discretion vested in the Secretary in the weighing and determination of the evidence, and it is respectfully submitted that the decision in the case at bar falls within the latitude of that discretion, and is not subject to judicial review.

It is conceded by appellant that the alleged father deliberately perjured himself in 1911 and so like-

wise must his corroborating witness at that time have perjured himself if the present claims of the alleged father be true. Such being the case, we desire to refer to the remarks of his Honor Justice Storey, found in the case

*Santissima Trintdad and the St. Ander,* 7 Wheat. 283; 5 L. Ed. 454-468.

> "If the circumstances respecting which the testimony is discordant be material, and of such a nature that mistakes may easily exist, and be accounted for in a manner consistent with the utmost good faith and probability, there is much reason for indulging the belief that the discrepancies arise from the infirmity of the human mind, rather than from deliberate error. But where the party speaks to a fact in respect to which he cannot be presumed liable to mistake, as in relation to the country of his birth, or his being in a vessel on a particular voyage, or living in a particular place, if the fact turn out otherwise, it is extremely difficult to exempt him from the charge of deliberate falsehood; and courts of justice, under such circumstances, are bound, upon principles of law, and morality and justice, to apply the maxim, *falsus in uno, falsus in omnibus.* What ground of judicial belief can there be left, when the party has shown such gross insensibility to the difference between the right and wrong, between truth and falsehood."

The contradictions in the testimony of this witness are so apparent and are so numerous that no

court of justice could venture to rely on it without danger of being betrayed into the grossest errors.

The case of *White vs. Young Yen,* 278 Fed. 619, is clearly in point. The Court, speaking through His Honor Judge Gilbert, said:

> "We are unable to see on what ground it can be held that the proceedings before the board of special inquiry were unfair. That the board reached the conclusion that the proofs were insufficient to show that the appellees were the sons of Young Fai. Young Fai testified that they were his sons and that he was married in China in K. S. 19-1-16, which would be March 4, 1893. But it is shown that in 1897, on his return from China, when he was permitted to enter as a citizen of the United States, Young Fai testified: 'I am not married.' * * * The discrepancies in Young Fai's testimony as to the dates on which his sons were born may be unimportant, but his contradictory statements as to the fact of his marriage and the date thereof may well have been deemed important by the board of special inquiry, and sufficient to discredit Young Fai's testimony that appellees were his sons. We cannot say, in view of the statements of Young Fai, that the conclusion reached by the board was manifestly unfair. It is not the function of this court in habeas corpus proceedings to weigh the sufficiency of the probative facts. It is sufficient in such a case, if there is some testimony to sustain the conclusion reached. Here there was, we think, substantial ground to dis-

> credit the testimony which was adduced on behalf of the applicants. The judgment is reversed, and the cause remanded, with instructions to remand the appellees to custody."

So that examining the evidence in toto, it would seem that there was ample evidence before the Department to justify and sustain their finding, notwithstanding the fact that the testimony of each of the witnesses produced was in good agreement with the other, but not with their own prior sworn statements, to which attention was called in the findings of the port officials. The fact that the father had in 1911, at a time subsequent to the birth of his alleged son, unqualifiedly and unequivocally stated that he was not then married, had no marriage name, had not been to China since his arrival, was in the United States at Reedley, California, for four years prior to November, 1911, the date this statement under oath was made, that he had made loans of money in June and July, 1908, by which representations he claimed and received the return certificate entitling him to depart in 1911; in view of the fact that corroboration was produced at that time for the said averments in the person of his debtor, Jan Hing Yin; in view of the fact that there is no resemblance between the applicant and his alleged father (Exhibit A, page 36), and in view of the fact that the dates of birth as testified to by the applicant and his alleged father vary by one year; that the testimony of each and every one of the witnesses is not in consonance with the matter

in their and each of their affidavits; in view of the fact that the father was apprised of the reasons for denying the admission of the applicant in the first instance, and was, after a conference with his attorney, permitted and allowed to offer additional evidence respecting one of the grounds for denial, which resulted in the elimination of that objection and was given the opportunity to produce additional evidence to meet the objection raised by the local Bureau arising out of his 1911 testimony, at which time the witnesses later produced were all available to him and must have been were the facts as later represented by them to be, present in his mind at that time, nevertheless he, through his attorney, at that time stated he had no further or additional evidence to submit. Certainly the fact that the trip essential to paternity was made under a name which the alleged father has, according to all the testimony given on other occasions, never referred to as one under which he was known, though in 1907 witnesses were produced to show they had known the then applicant under said name for a period of three years, the fact that the occupation, residence and status of said Jang Ah Fook, 1907 passenger, was different from that of the 1911 passenger Jang Sing, the fact that the inspector's report in Exhibit D, page 5, shows the alleged father to have been a cook and restaurant keeper for a period of seven years prior thereto (1911), the fact that the record respecting the book account of the alleged father introduced in evidence by him and substantiated by

the testimony of his alleged debtor indicates payments in Reedley, California, in 1908, all of which, if true, precludes the truth of the alleged father's present testimony and all of which places doubt and suspicion upon the claim of relationship between the applicant and Jang Sing, and gives support to the finding made in this case that the relationship of father and son does not exist.

The burden of proof to establish the right of an alien to admission rests upon the alien. This burden has not been met by the applicant in this case. The claim is made by counsel admitting that the alleged father's testimony in 1911 is totally false and untrue (appellant's brief, pages 42, 43 and 44), that nevertheless sufficient evidence has been offered to amount to a preponderance of evidence to establish the relationship claimed between Jang Sing and applicant. Their contention therefore, amounts to this, that admitting that the alleged father's testimony is such as to establish the fact that he is not the father yet provided a sufficient *number* of persons whose testimony is in substantial agreement to the effect that he is the father, are introduced, that therefore he is the father and the arbiter of the question of fact must so find. We defy him to sustain this position. The law is positive and definite and places upon the administrative authorities the power to determine questions of fact that arise pertaining to admission of aliens into this country.

*Section* 17 *of the Act of February* 5, 1917.

This right, were the contentions of appellant to be sustained, would amount to nothing. The law relating to juries as well as to administrative officials or others entrusted with the power to determine a question of fact, is that they are to be the judges of the weight and sufficiency of the evidence, and the mere number of witnesses testifying to a certain condition or situation does not of itself control their decision. This is elementary and needs no citation of authority. As a matter of fact to disregard and treat as false the 1911 testimony of the alleged father, as counsel would have us do to sustain his present position, we must believe that a conspiracy between the alleged father and his alleged debtor at that time was practicad on the Department to obtain the certificate issued at that time. If that be so, is it not quite likely that a conspiracy is now being practiced by the same party to obtain the admission of the applicant?

On the other hand, assuming that it is possible that the 1911 testimony is true, as counsel in their brief submitted to the Department (Exhibit A, page 62) concede possible, then the whole structure of this applicant's case, together with the testimony of the various witnesses, falls to the ground.

This was the question before the port officials and before the department on review to pass upon. The port officials in each instance decided that the alleged father was not in fact and in truth such, and their findings so held. The case of *U. S. vs. Pierce,* 289

Fed. 233, referred to in counsel's brief at page 38, involves a different situation entirely. In that case the port officials, who are the only officials who see and hear the various witnesses in person, decided and believed that the applicant was the son of the witness claimed to be his father, but stated that by reason of the inconsistent stories and the state of the record, they were required to and did find that the relationship did not in fact exist. Their decision was sustained on appeal before the Department and the matter was then taken into court and the decision of the court was that they were obligated to find according to their real decision on the issue before them. The case and particularly the paragraphs quoted by counsel are particularly helpful to sustain the port officials in their decision in the case at bar. There it is said

> "as in any other case, there are no regulating canons for a determination of a question of fact. * * * We have nothing to do with the propriety of the Board's actual decision; it is enough that the statute gives them the final word."

In the instant case the port officials in each of their findings confirm their conviction that the claimed relationship does not exist. They are the only triers of the fact in issue. There is nothing whatsoever to be found in their findings which indicates a belief contrary to their findings.

Further, as has been heretofore disclosed in the

question of procedure, there is no rule whatsoever requiring port officials to find against the applicant where prior adverse statements have been made or any rule directing them to find in a particular manner in any case whatsoever.

The Pierce decision, therefore, and the *In Re Wong Toy* decision, 278 Fed. 562, have no application to the case at bar.

Because of the character of the evidence the administrative authorities were called upon to exercise their discretion in a determination of the matter before them:

> "The exercise of an honest judgment, however erroneous it may appear to be, is not an abuse of discretion. Abuse of discretion and especially gross and palpable abuse of discretion, which terms are ordinarily employed to justify an interference with the exercise of discretionary power, implies not merely error of judgment, but perversity of will, passion, prejudice, partiality or moral delinquency. 29 *N. Y.*, 418, 413."
>
> *I. C. J.*, 372.

It appears from the record that the Secretary took pains to do this applicant full justice. The case was twice re-opened, the record was fully considered and in the exercise of the discretion committed to them by statute they determined that the relationship did not exist and excluded the applicant. There being evidence to support the finding the decision

is not subject to judicial review under the well-settled rule that courts cannot review an order of the immigration authorities excluding a Chinese person where there is any evidence to support the decision.

*Ex Parte Ng Kwack Kang,* 233 Fed. 478

*Frick vs. Lewis,* 195 Fed. 693

*Ex Parte Kusuki Sata,* 215 Fed. 173

*U. S. v. Howe,* 235 Fed. 990

*Ex Parte Chin Doe Tung,* 236 Fed. 1017

*Lam Fung You vs. Frick,* 233 Fed. 393

It is respectfully submitted that from an examination of the entire record it appears that a full, fair and impartial hearing as provided by law was afforded the applicant; that no abuse of discretion appears in the consideration of the evidence or the rules of law pertaining thereto, and that the decision of the immigration authorities finds adequate support in the evidence.

Dated: San Francisco, California, December —, 1923.

Respectfully submitted,

JOHN T. WILLIAMS,
*United States Attorney.*

ALMA M. MYERS,
*Asst. United States Attorney.*
*Attorneys for Appellee.*

No. 4055

# United States

# Circuit Court of Appeals

## For the Ninth Circuit.

GARCIA & MAGGINI COMPANY, a Corporation,
Plaintiff in Error,

vs.

WASHINGTON DEHYDRATED FOOD COMPANY, a Corporation,
Defendant in Error.

# Transcript of Record.

**Upon Writ of Error to the Southern Division of the United States District Court of the Northern District of California, Second Division.**



Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

No. 4055

# United States

# Circuit Court of Appeals

## For the Ninth Circuit.

GARCIA & MAGGINI COMPANY, a Corporation,
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vs.

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Defendant in Error.

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FRED L. DREHER, Esq., Bank of Italy Bldg., San Francisco, Calif.,
Attorney for Plaintiff in Error.

Messrs. HAVEN, ATHEARN, CHANDLER & FARMER, Balboa Bldg., San Francisco, Calif.,
Attorneys for Defendant in Error.

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In the Southern Division of the District Court of the United States, for the Northern District of California, Second Division.

No. 16,703.

WASHINGTON DEHYDRATED FOOD CO., a Corporation,
Plaintiff,

vs.

GARCIA & MAGGINI CO., a Corporation,
Defendant.

**Complaint on Contract.**

Plaintiff complains of defendant and for cause of action alleges:

I.

Plaintiff is a corporation duly organized and existing as such under the laws of the State of Washington and is a citizen of said State of Washington.

II.

Defendant is a corporation duly organized and existing as such under the laws of the State of California and is a citizen of said State of California,

and a resident of the Southern Division of the Northern District of said State.

III.

Plaintiff and defendant on or about June 13, 1919, at the City and County of San Francisco, State of California, entered into a contract in writing wherein and whereby plaintiff agreed to sell to defendant and defendant agreed to buy from plaintiff sixty thousand (60,000) pounds extra choice evaporated apples at an agreed price of Eleven Thousand Four Hundred ($11,400.00) Dollars. Said contract provided that delivery of said evaporated apples was to be made by plaintiff to defendant in January, 1920, f. o. b. cars at Wenatchee in the State of Washington, for shipment by route or routes and to destination to be designated by defendant. [1*]

IV.

Plaintiff on or about January 17, 1920, advised defendant that plaintiff was ready, willing and able to deliver said evaporated apples in accordance with the terms of said contract, and demanded that defendant forthwith furnish plaintiff with shipping instructions for the shipment of said evaporated apples, as provided in said contract.

Defendant failed and refused to furnish plaintiff with said or any shipping instructions, and on or about January 23, 1920, notified plaintiff that it, the said defendant, would not perform the terms of the aforesaid contract, and has at all times herein mentioned failed and refused to perform the same.

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*Page-number appearing at foot of page of original certified Transcript of Record.

V.

Plaintiff, or or about February 13, 1920, notified defendant that unless defendant forthwith performed said contract, plaintiff would resell said evaporated apples and would hold defendant for any loss suffered thereby.

VI.

Plaintiff, within a reasonable time after the aforesaid notice, sold said evaporated apples for the sum of Seven Thousand Fifty ($7,050.00) Dollars.

Subsequent to the demand by plaintiff of defendant for the performance of the terms of said contract, and prior to the sale of said evaporated apples by it, plaintiff paid out for storage and insurance on said evaporated apples the sum of Four Hundred Twenty-six and 44/100 ($426.44) Dollars, which expense was necessarily incurred by plaintiff in caring for said apples during said period.

By reason of the refusal of defendant to perform the terms of said contract, plaintiff was deprived of the use of the money which was payable to it under the terms of said contract, for a period of six (6) months and eighteen (18) days, and plaintiff was required to pay interest thereon in a total sum of Five Hundred One and 60/100 ($501.60) Dollars.

Plaintiff further incurred necessary expenses in making said sale in the approximate sum of Fifteen Hundred ($1500.00) Dollars. [2]

VII.

By reason of the foregoing facts plaintiff has been

damaged in the sum of Six Thousand Seven Hundred Seventy-seven and 4/100 ($6,777.04) Dollars.

And for a further and second cause of action, plaintiff alleges:

I.

Plaintiff is a corporation duly organized and existing as such under the laws of the State of Washington and is a citizen of said State of Washington.

II.

Defendant is a corporation duly organized and existing as such under the laws of the State of California and is a citizen of said State of California, and a resident of the Southern Division of the Northern District of said State.

III.

Plaintiff and defendant on or about June 13, 1919, at the City and County of San Francisco, State of California, entered into a contract in writing wherein and whereby plaintiff agreed to sell to defendant and defendant agreed to buy from plaintiff sixty thousand (60,000) pounds extra choice evaporated apples at an agreed price of Eleven Thousand Four Hundred ($11,400.00) Dollars. Said contract provided that delivery of said evaporated apples was to be made by plaintiff to defendant in January, 1920, f. o. b. cars at Wenatchee in the State of Washington, for shipment by route or routes and to destination to be designated by defendant.

IV.

Plaintiff on or about January 17, 1920, advised de-

fendant that plaintiff was ready, willing and able to deliver said evaporated apples in accordance with the terms of said contract, and demanded that defendant forthwith furnish plaintiff with shipping instructions for the shipment of said evaporated apples, as provided in said contract.

Defendant failed and refused to furnish plaintiff with said or any shipping instructions, and on or about January 23, 1920, notified plaintiff that it, the said defendant, would not perform [3] the terms of the aforesaid contract, and has at all times herein mentioned failed and refused to perform the same.

V.

The value of the aforesaid quantity and quality of evaporated apples to plaintiff at Wenatchee, in the State of Washington, on or about January 17, 1920, was the sum of Twenty-four Hundred ($2400.00) Dollars.

VI.

By reason of the foregoing facts plaintiff has been damaged in the sum of Nine Thousand ($9,000.00) Dollars.

WHEREFORE, plaintiff prays judgment against defendant in the sum of Nine Thousand ($9,000.00) Dollars, together with interest thereon at the rate of seven (7%) per annum from January 17, 1920, and for its costs incurred herein.

HAVEN, ATHEARN, CHANDLER & FARMER,

Attorneys for Plaintiff.

State of Washington,
County of Yakima,—ss.

Ira D. Cardiff, being first duly sworn, deposes and says:

That he is the general manager of the Washington Dehydrated Food Co., a corporation, plaintiff in the above-entitled action, and as such makes this affidavit.

That he has read the foregoing complaint and knows the contents thereof; that the same is true of his own knowledge except as to those matters which are therein stated upon information and belief and as to such matters he believes it to be true.

IRA D. CARDIFF.

Subscribed to and sworn to before me this 7th day of March, 1922.

[Seal] C. ALBERT PALMER,
Notary Public in and for the State of Washington, County of Yakima.

[Endorsed]: Filed Mar. 13, 1922, W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [4]

---

(Title of Court and Cause.)

**(Demurrer of Defendant.)**

Comes now the defendant above named and demurring to the complaint of plaintiff on file herein for grounds of demurrer specifies:

I.

That complaint does not state facts sufficient to constitute a cause of action against defendant.

II.

That the first cause of action as set forth in said complaint does not state facts sufficient to constitute a cause of action against said defendant.

III.

That the second cause of action as set forth in said complaint does not state facts sufficient to constitute a cause of action against said defendant.

IV.

That the first cause of action as set forth in said complaint is uncertain in the following particulars, viz: that it cannot be determined nor ascertained therefrom—

(a) On what date plaintiff sold the evaporated apples as alleged in paragraph VI thereof.

(b) Whether plaintiff sold said apples at public or private sale.

(c) What the market value of said evaporated apples was on January 23d, 1920, or at the time the same are alleged to have been sold.

V.

That said first cause of action as set forth in said complaint is ambiguous in the same particulars wherein it is herein specified to be uncertain.

VI.

That said first cause of action as set forth in [5] said complaint is unintelligible in the same particulars wherein it is herein specified to be uncertain.

VII.

That said second cause of action as set forth in said complaint is uncertain in the following particulars, viz., that it cannot be determined nor ascertained therefrom—

(a) How or in what manner plaintiff has arrived at the value of said apples as alleged in paragraph V thereof.

(b) What price plaintiff could have obtained for said evaporated apples in the market nearest to the place that they should have been accepted by defendant, and at such time after the alleged breach of the contract as would have sufficed with reasonable diligence for the plaintiff to effect a resale.

VIII.

That the said second cause of action as set forth in said complaint is ambiguous in the same particulars wherein it is herein specified to be uncertain.

IX.

That said second cause of action as set forth in said complaint is unintelligible in the same particulars wherein it is herein specified to be uncertain.

WHEREFORE, defendant prays to be hence dismissed with its costs.

FRED L. DREHER,
Attorney for Defendant.

I hereby certify that the foregoing demurrer is in the opinion of the undersigned counsel for the defendant well taken in point of law and that the same is not filed for the purpose of delay.

Dated: March 30th, 1922.

FRED L. DREHER,
Attorney for Defendant. [6]

Due service of a copy of the within demurrer of defendant is hereby admitted this 30th day of March, 1922.

HAVEN, ATHEARN, CHANDLER & FARMER,
Attorneys for Plaintiff.

[Endorsed]: Filed Mar. 30, 1922. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [7]

---

(Title of Court and Cause.)

**Notice of Motion to Strike Out.**

To the Plaintiff Above Named and to Messrs. Haven, Athearn, Chandler & Farmer, Attorneys for Plaintiff.

PLEASE TAKE NOTICE that on the 10th day of April, 1922, at the hour of ten o'clock A. M. of said day, and at the courtroom of the above-entitled court, Second Division thereof, located at Seventh and Mission Streets, in the city and county of San Francisco, State of California, the defendant above named will move the above-entitled court to strike out from the complaint of plaintiff on file herein the following portions thereof, to wit:

All of paragraphs V and VI of the first cause of action as set forth in said complaint.

Said motion will be made on the ground that said

portions of said complaint are irrelevant and redundant, and will be based on all of the papers and pleadings on file herein, and on this notice of motion.

Dated: March 30th, 1922.

FRED L. DREHER,
Attorney for Defendant.

Due service of a copy of the within notice of motion to strike out is hereby admitted this 30th day of March, 1922.

HAVEN, ATHEARN, CHANDLER & FARMER,
Attorneys for Plaintiff.

[Endorsed]: Filed Mar. 30, 1922. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [8]

---

At a stated term, to wit, the March term, A. D. 1922, of the Southern Division of the United States District Court for the Northern District of California, Second Division, held at the courtroom in the city and county of San Francisco, on Monday, the 8th day of May, in the year of our Lord one thousand nine hundred and twenty-two. Present: The Honorable WILLIAM C. VAN FLEET, District Judge.

No. 16,703.

WASHINGTON DEHYDRATED FOOD CO.

vs.

GARCIA & MAGGINI CO.

**Minutes of Court—May 8, 1922—Order That Demurrer be Withdrawn, etc.**

By consent, ordered that the demurrer to complaint and motion to strike out parts be withdrawn with ten days to answer. [9]

---

(Title of Court and Cause.)

**(Answer of Defendant.)**

Comes now the defendant above named and answering plaintiff's complaint on file herein, admits, denies and alleges as follows:

I.

Answering the first cause of action set forth in said complaint, denies that plaintiff and defendant on or about June 13th, 1919, or at the City and County of San Francisco, State of California, or at any other time or place, entered into a contract in writing wherein or whereby plaintiff agreed to sell to defendant or defendant agreed to buy from plaintiff sixty thousand pounds or any other quantity of extra choice evaporated apples or at an agreed price of Eleven Thousand Four Hundred (11,400) Dollars or at an agreed price of any other sum or sums or any other apples or at all, except as hereinafter alleged with respect to that certain contract, a copy of which is hereto attached and marked Exhibit 1; denies that said contract provided that delivery of said evaporated apples or any part thereof was to be made by plaintiff to defendant in

January, 1920, or at any other time f. o. b. cars at Wenatchee, in the State of Washington or for shipment by route or routes or to destination to be designated by defendant, and in this behalf defendant alleges that on or about the 13th day of June, 1919, plaintiff and defendant entered into a contract in writing, a copy of which said contract is hereto attached, made a part hereof and marked Exhibit 1, and that said last mentioned contract was and is the only contract entered into by plaintiff and defendant on or about said date wherein and whereby defendant agreed to purchase any evaporated apples from plaintiff.

II.

Denies that on or about January 17th, 1920, or at any other time plaintiff advised defendant that plaintiff was [10] ready or willing or able to deliver said evaporated apples or any apples in accordance with the terms of said contract, a copy of which is hereunto attached, marked Exhibit 1, and denies that plaintiff demanded that defendant furnish plaintiff with shipping instructions for the shipment of the evaporated apples or any apples provided for in said last mentioned contract.

III.

Denies that plaintiff on or about February 13th, 1920, or at any other time notified defendant that unless defendant forthwith perform said last mentioned contract that plaintiff would resell the evaporated apples provided for in said last mentioned contract or any part of said apples or that

plaintiff would hold defendant for any loss suffered thereby.

IV.

Alleges that defendant has not sufficient information or belief to enable it to answer the allegations contained in paragraph VI of the first count or cause of action contained in said complaint and placing its denial on that ground denies that plaintiff within a reasonable time after the 13th day of February, 1920, or at any other time sold said evaporated apples for the sum of Seven Thousand and Fifty (7,050) Dollars, or for any other sum less than the sum of Eleven Thousand Four Hundred Dollars;

Denies that subsequent to the demand by plaintiff of defendant for the performance of the terms of said contract or prior to the sale of said evaporated apples by it or at any other time plaintiff paid out for storage or insurance on said evaporated apples or any apples the sum of Four Hundred Twenty Six, and 44/100 (426.44) Dollars, or any other sum and denies that said expense or any expense was necessarily incurred or incurred by plaintiff in caring for said apples during said period or for any other period.

Denies that by reason of the refusal of defendant to perform any of the terms of said contract plaintiff was deprived of the use of the money which was payable to it under the terms of said contract, or any money, or for a period of six months or eighteen days or for any other period, or that plaintiff was [11] required to pay interest thereon in

the sum of Five Hundred One and 60/100 (501.60) Dollars or any other sum or at all.

Denies that plaintiff further incurred necessary expenses or any expenses in making said sale in the approximate sum of Fifteen Hundred (1500) Dollars or any sum or at all.

V.

Denies that plaintiff has been damaged in the sum of six thousand seven hundred seventy seven and 04/100 (6777.04) dollars, or any other sum or at all.

And answering the second count or cause of action set forth in said complaint, said defendant admits, denies and alleges as follows:

I.

Denies that plaintiff and defendant on or about June 13th, 1919, or at the city and county of San Francisco, State of California, or at any other time or place entered into a contract in writing wherein or whereby plaintiff agreed to sell to defendant or defendant agreed to buy from plaintiff sixty thousand pounds or any other quantity of extra choice evaporated apples or at an agreed price of eleven thousand four hundred (11,400) dollars or at an agreed price of any other sum or sums or any other apples or at all, except as hereinafter alleged with respect to that certain contract, a copy of which is hereto attached and marked Exhibit 1; denies that said contract provided that delivery of said evaporated apples or any part thereof was to be made by plaintiff to defendant in January, 1920 or at any other time f. o. b. cars at Wenatchee, in the State of Washington or for shipment by route or routes

or to destination to be designated by defendant and in this behalf defendant alleges that on or about the 13th day of June, 1919, plaintiff and defendant entered into a contract in writing, a copy of which said contract is hereto attached, made a part hereof, and marked Exhibit 1 and that said last mentioned contract was and is the only contract entered into by plaintiff and defendant on or about said date wherein and whereby defendant agreed to [12] purchase any evaporated apples from plaintiff.

II.

Denies that on or about January 17th, 1920, or at any other time plaintiff advised defendant that plaintiff was ready or willing or able to deliver said evaporated apples or any apples in accordance with the terms of said contract, a copy of which is hereunto attached marked Exhibit 1, and denies that plaintiff demanded that defendant furnish plaintiff with shipping instructions for the shipment of the evaporated apples or any apples provided for in said last mentioned contract.

III.

Defendant alleges that it has not sufficient information or belief to enable it to answer the allegations contained in paragraph V of the second cause of action contained in said complaint and placing its denial on that ground denies that the value of the said quantity or quality of evaporated apples to plaintiff at Wenatchee, in the State of Washington, or at any other place on or about January 17th, 1920, or within any reasonable time thereafter was

the sum of Twenty-four Hundred (2400) Dollars, or any sum less than the sum of Eleven Thousand Four Hundred (11,400) Dollars, and in this behalf defendant is informed and believes and therefore upon such information and belief alleges that the value of the quantity and quality of evaporated apples mentioned in said complaint to the plaintiff at the point of shipment provided for in said contract on or about January 17th, 1920, and for a reasonable time thereafter was not less than the sum of eleven thousand four hundred (11,400) dollars.

V.

Denies that plaintiff has been damaged in the sum of nine thousand (9,000) dollars or any sum or at all.

And further answering plaintiff's complaint on file herein, said defendant alleges that on or about the 13th day of June, 1919, plaintiff and defendant entered into a contract in writing, a copy of which said contract is hereto attached marked [13] Exhibit 1 and made a part hereof, and that said last mentioned contract was and is the only contract entered into by plaintiff and defendant on or about said 13th day of June, 1919, wherein or whereby defendant agreed to purchase any evaporated apples from plaintiff; that on or about the 23d da of January, 1920, said contract was rescinded and cancelled by said defendant and that plaintiff on or about said last mentioned date accepted and consented to such rescission and cancellation and thereupon all obligations on the part of the defendant therein contained were extinguished.

WHEREFORE defendant prays that plaintiff take nothing by its complaint on file herein and that defendant have judgment for its costs incurred.

FRED L. DREHER,
Attorney for Defendant.

State of California,
City and County of San Francisco,—ss.

Albert Asher, being first duly sworn, deposes and says: That he is an officer, to wit, the president of Garcia & Maggini Co. the defendant above-named, and makes this affidavit for and on behalf of said defendant corporation; that he has read the foregoing answer and knows the contents thereof; that the same is true of his own knowledge except as to those matters alleged therein on information and belief and as to those he believes the same to be true.

ALBERT ASHER.

Subscribed and sworn to before me this 31st day of May, 1922.

[Seal] HARRY L. HORN,
Notary Public in and for the City and County of San Francisco, State of California. [14]

BROKER'S COPY

RAIL SHIPMENT

# GARCIA & MAGGINI CO.

SAN FRANCISCO, CALIFORNIA

No.

## CALIFORNIA DRIED FRUIT CONTRACT

Adopted April 23, 1919, by

NATIONAL WHOLESALE GROCERS' ASSOCIATION OF THE UNITED STATES and
DRIED FRUIT ASSOCIATION OF CALIFORNIA

June 13 1919.

Garcia & Maggini Co. OF San Francisco, Cal.

Washington Dehydrated Food Co. Yakima, Wash.

Hereinafter called Buyer, has bought, and [illegible] hereinafter called Seller, has this day sold the following quantities of California Dried Fruits, as per varieties, style of package and prices, named below, and on terms and conditions stated on reverse side of this contract.

ROUTING Later

DESTINATION Later

CONSIGNED TO Garcia & Maggini Co.

TIME OF SHIPMENT December or January (Seller's Option)

| NO. AND KIND OF PACKAGE | NET WEIGHT IN POUNDS | BRAND | GRADE | VARIETIES | BULK BASIS | PRICE PER POUND | PRICE PER PACKAGE | ✓ |
|---|---|---|---|---|---|---|---|---|
| 1 Car | 60,000# net | Choice | | Evaporated Apples | 18-1/2¢ | | | |

With provision that seller may be privileged to substitute grades providing cannot fill order with grade ordered at Extra Choice 19¢

Fancy 19-3/4¢

All on basis packed in 50# boxes, 25# boxes 1/2¢ advance. Seller's grading or inspection by buyer at shipping point.

# CALIFORNIA DRIED FRUIT CONTRACT

## (Rail Shipment)

### ADOPTED APRIL 23, 1919, BY

### NATIONAL WHOLESALE GROCERS' ASSOCIATION OF THE UNITED STATES AND DRIED FRUIT ASSOCIATION OF CALIFORNIA

(As per specifications on reverse side)

**TERMS:** F. O. B. Pacific Coast Rail Shipping Point. Cash less two per cent (2%) if draft is paid within ten (10) days from date thereof, otherwise net cash thirty (30) days after date of draft, unless shipment arrives prior thereto in which case payment shall be made within three (3) full business days after arrival. Payment to be made against draft with documents attached in New York, Chicago or San Francisco Exchange, or equivalent.

**EXAMINATION AND APPROVAL:** Buyer shall have no right of claim nor be entitled to arbitration and contract shall be considered fully complied with on Seller's part unless claim is made or arbitration demanded within three (3) full business days after arrival of goods or if examination is impossible within that time by reason of goods not being accessible for examination, then within said period after examination becomes possible.

**ROUTING:** Seller shall, where possible, recognize routing named by Buyer, but Seller has option of selecting the initial line. Should Buyer divert goods while in transit without Seller's consent, Seller shall be relieved of all responsibility for quality and/or condition. Change in routing from rail to water shipment (if requested) is subject to Seller's confirmation. Buyer assuming freight to and charges at Dock, State Toll, and all unloading and/or loading charges at Port. On such water shipments and on shipments to be made via Gulf Lines, the provisions of this contract shall be modified and superseded by the terms and conditions contained in the form of contract of the Seller, effective June 2nd, 1919, known as Dried Fruit Association of California Water Shipment Contract; but if at any time within ten (10) days prior to final shipping date it be found impossible by reason of blockade or embargo to ship via Gulf Lines, Seller shall notify Buyer and in the absence of immediate instructions to ship via another route then open or to store goods for Buyer's account, the Seller shall be privileged to ship by any rail route at current freight rates. Should it be found impossible by reason of aforesaid causes to ship all rail, Seller shall then be privileged to store and insure at Buyer's expense. If goods are shipped all rail the terms and conditions of this contract shall apply; if stored Buyer agrees to pay Seller's draft at two (2) days' sight, less two per cent (2%) discount, to which shall be attached (in addition to the weight and quality certificates provided by said Water Shipment Contract) Warehouse Receipt and Fire Insurance Certificate.

**RESPONSIBILITY:** Notwithstanding shipped to Seller's order, goods are at risk of Buyer from and after delivery to Carrier, and Buyer hereby assumes responsibility as to shortage, loss, delay or damage in transit upon issuance by Carrier of clean Bill of Lading or shipping receipt. Goods are at Buyer's risk when delivered at his request to a third party.

**QUALITY:** Good merchantable, unless otherwise specified, and equal to or better than the average of the grade for the section where grown and of the current season at time of shipment. If sold on sample, to be equal to or better than sample.

**SEPARABLE LOTS:** This contract shall be deemed separable as to all goods sold hereunder and Buyer may not refuse to receive any lot or portion of the goods shipped hereunder for failure of any other lot or portion to comply with the contract, UNLESS THE RIGHT TO SO REFUSE IS EXPRESSLY PROVIDED FOR ON THE REVERSE SIDE HEREOF.

**WEIGHTS:** No allowance shall be made except for shortage of average weights in excess of one per cent (1%) to be ascertained and certified by public weigher upon a weighing for gross, of not less than fifty per cent bulk [illegible] less than two per cent (2%) of the shipment. Carton Goods: No. 10 to average fifteen (15) ounces net [illegible] ounces net when packed. All other package goods to conform to established trade custom.

**SPECIFICATIONS:** If no assortment is agreed upon at time of sale it is expressly understood that sale is made subject to Seller's approval of a reasonable assortment specified by Buyer, based on season's crop; unless such assortment is reasonable and is specified by Buyer at least thirty (30) days prior to the last day of shipping period, Buyer agrees to accept Seller's assortment according to Seller's grading, and unless specifications for packing are furnished prior to said thirty (30) days Seller may ship goods in any standard size packages.

**LIABILITY:** If the operations of the Seller shall be prevented or interfered with by exercise of Governmental authority, or by force majeure, embargo, war, civil uprising, fire, strikes, or similar casualty beyond reasonable control of Seller, the Seller shall be excused from performance hereof to the extent that performance of this contract (taking into account all outstanding contracts of the Seller for the delivery of the same class of goods) shall be so prevented or interfered with. **Extension of Time:** Should Seller be obstructed or delayed in the fulfillment of any portion of this contract by any of the aforementioned causes, or the failure of transportation facilities, then the time herein fixed for its fulfillment shall be extended for a period equivalent to the time lost for any or all of the reasons aforesaid, provided notice of such obstruction or delay is given before expiration of period herein fixed for shipment, and provided further that any premium for stipulated shipment be waived by Seller. It is agreed that if by reason of any of the aforementioned causes shipment of any of said goods is not made within sixty (60) days after the time herein specified therefor, this contract shall terminate with respect to any goods not then shipped. **Future Sales:** In the event of destruction of or serious damage to crops after April 15th, of the year in which this sale is made and subsequent to the date of this contract, Seller may reduce quantity twenty-five per cent (25%) without penalty. If less than seventy-five per cent (75%) is tendered, Seller shall pay as damages fifteen per cent (15%) of net contract price of shortage below seventy-five per cent (75%) unless the California State Commission of Horticulture shall decide the Seller is justified in delivering a smaller percentage because of crop damage. Unless a particular district is specified, the crop of the entire State of the variety of fruit named is to be taken into consideration in determining what is a fair delivery.

**POOL CARS:** Distribution charges at destination at expense of Buyer. Where goods are sold in less than carload quantities to be included in car for various Buyers to be completed here, and said car is not completed within ten (10) days of expiration of contract time for shipment, Seller may ship goods in car to some point nearby to destination and the Buyer shall then pay local freight from such point to final destination.

**ARBITRATION:** Except for the determination to be made by the California State Commission of Horticulture as provided for under sub-heading "Future Sales" of LIABILITY Clause, any dispute arising under this contract shall be immediately submitted to arbitration in either New York, Chicago, San Francisco, Baltimore, Boston, Buffalo, Cincinnati, Cleveland, Denver, Detroit, Indianapolis, Kansas City, Minneapolis, New Orleans, Oklahoma City, Omaha, Peoria, Philadelphia, Pittsburgh, Richmond, St. Louis, St. Paul, Seattle or Toledo. The particular city in which arbitration is to be held shall, in the absence of agreement by the parties, be in the city which is nearest to destination of shipment. Arbitrations in New York shall be held before the Dried Fruit Association of New York; in Chicago, before the Dried and Canned Foods Association. In San Francisco before the Dried Fruit Association of California; in the remaining cities, by the Joint arbitration boards appointed by the National Wholesale Grocers Association and the National Canned Goods and Dried Fruit Brokers' Association. A written statement of facts and anything else that may have proper bearing on the case, together with written argument thereon, may be presented to the Secretary of the Association or the Chairman of the Arbitration Board, as the case may be, and shall by him be submitted in its entirety to the arbitrators, but no oral presentation shall be made unless the parties agree thereto and same is permitted or requested by the arbitrators. If the decision is in favor of Seller, invoice, if unpaid shall become due and payable, at once. If decision is against Seller arbitrators shall determine amount of allowance which, if draft has been paid, shall be immediately refunded by Seller and if draft has not been paid, shall be deducted from invoice and the correct amount paid immediately. If arbitrators find bad faith or gross carelessness on the part of Seller they may either allow reiection, award damages therefor, or require another tender in compliance with this contract. Arbitration shall be held upon not less than one per cent (1%) unbroken and unopened packages. The arbitrators shall assess costs of arbitration and the decision shall be final and binding on both parties who hereby agree to comply therewith. Failure of Seller to ship or Buyer to accept shall be considered a dispute to be settled by arbitration. Each party hereby agrees that in the event of his failure to comply with the award of the arbitrators within ten (10) days of date of such award, an action in court shall lie against him, based upon such award.

Receipt of a copy of the within answer of Garcia & Maggini Co., a corporation, is hereby admitted this 5th day of June, 1922.

HAVEN, ATHEARN, CHANDLER & FARMER,
Attorneys for Plaintiff.

[Endorsed]: Filed Jun. 5, 1922. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [16]

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(Title of Court and Cause.)

**Stipulation Waiving Jury.**

IT IS HEREBY STIPULATED by and between the parties hereto that a trial by jury in the above-entitled cause may be and the same is hereby waived.

HAVEN, ATHEARN, CHANDLER & FARMER,
Attorneys for Plaintiff.
FRED L. DREHER,
Attorney for Defendant.

Dated this 31st day of Aug., 1922.

[Endorsed]: Filed Sep. 1, 1922. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [17]

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At a stated term, to wit, the March term, A. D. 1923, of the Southern Division of the United States District Court for the Northern District of California, Second Division, held at the court-room in the City and County of San Francisco, on Thursday, the 26th day of April, in the year of our Lord one thousand nine hundred and twenty-three. Present: The Honorable

GEORGE M. BOURQUIN, District Judge for the District of Montana, designated to hold and holding this Court.

No. 16,703.

WASHINGTON DEHYDRATED FOOD CO.

vs.

GARCIA & MAGGINI CO.

**Minutes of Court—April 26, 1923—Order for Judgment.**

This cause heretofore tried and submitted, being now fully considered and the Court having filed its memorandum opinion, it is ordered that judgment be entered in favor of plaintiff and against defendant, in accordance with said opinion and on findings to be filed. [18]

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(Title of Court and Cause.)

**Findings of Fact and Conclusion of Law.**

The above-entitled action came on regularly for trial before the above-entitled court sitting without a jury, a jury trial having been waived by the respective parties, on April 21, 1923. Messrs. Haven, Athearn, Chandler & Farmer appeared as attorneys for plaintiff and Fred L. Dreher, Esq., appeared as attorney for the defendant. Certain oral and documentary evidence was thereupon introduced and the Court having considered the same and the arguments of respective counsel, now signs the following as its

## FINDINGS OF FACT.

### I.

On June 13, 1919, plaintiff and defendant entered into a contract in writing for the sale by plaintiff to defendant of sixty thousand pounds of evaporated apples at a price of nineteen cents per pound, or a total contract price of Eleven Thousand Four Hundred ($11,400.00) Dollars. A true, full and correct copy of said contract is attached to defendant's answer in the above-entitled action as Exhibit 1.

### II.

On or about January 17, 1920, plaintiff duly tendered to the defendant the delivery of the apples described in the aforesaid contract, and thereupon advised defendant that plaintiff was ready, willing and able to deliver said evaporated apples, in accordance with the terms of said contract, and demanded that defendant forthwith furnish plaintiff with shipping instructions for the shipment of said evaporated apples, as provided in said contract.

### III.

Defendant failed and refused to furnish plaintiff with said or any shipping instructions, and on or about January 23, 1920, notified plaintiff that it, the said defendant, would not perform [19] the terms of the aforesaid contract, and has continuously failed and refused to perform the same.

### IV.

On or about February 13, 1920, plaintiff notified defendant that unless defendant forthwith performed the terms of said contract and accepted delivery of said evaporated apples, plaintiff would

resell said evaporated apples and would hold defendant for any loss suffered thereby.

V.

On July 30, 1920, plaintiff sold said evaporated apples which were described in said contract, at a price of eleven and three-fourths (11–3/4) cents per pound, or a total sum of Seventy Hundred Fifty ($7,050.00) Dollars. Said sale was made within a reasonable time after the refusal of defendant to accept the delivery of said apples, and with due diligence and in good faith, and as soon as reasonably practicable, by a diligent, competent and prudent salesman, inspired by honesty of purpose and fair consideration for the defendant as well as for the plaintiff.

VI.

Subsequent to the demand by plaintiff of defendant for the performance of the terms of said contract, and prior to the sale of said evaporated apples by it, plaintiff segregated the apples covered by said contract in a warehouse, and paid storage upon the same in the sum of Three Hundred ($300.-00) Dollars, which expense was necessarily incurred by plaintiff in caring for said apples during said period.

VII.

The aforesaid contract of June 13, 1919, was never rescinded or canceled by the defendant, and the plaintiff never accepted or consented to such rescission or cancellation, and the obligations on the part of the defendant therein contained never were extinguished.

From the foregoing facts, the Court finds the following

CONCLUSION OF LAW.

Plaintiff is entitled to judgment herein against the [20] defendant for the sum of Forty-three Hundred Fifty ($4,350.00) Dollars, which is the difference between the contract price for the aforesaid apples and the amount received by plaintiff upon the resale thereof, together with interest upon said sum at the rate of six (6) per cent per annum from March 1, 1920, to date of judgment and also for the further sum of Three Hundred ($300.00) Dollars, expense of storage of said apples, with interest on said last named sum at the rate of six (6) per cent per annum from July 30, 1920, to date of judgment, and also for its costs of suit herein to be taxed.

Let judgment be entered accordingly.

Dated, April 27, 1923.

BOURQUIN,
United States District Judge.

Court advised by plaintiff's counsel defendant's counsel states "no objections."

Receipt of the within by copy is hereby admitted this 26th day of April, A. D. 1923.

FRED L. DREHER,
Attorney for Defendant.

[Endorsed]: Filed Apr. 27, 1923. Walter B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [21]

(Title of Court and Cause.)

**Judgment on Findings.**

This cause having come on regularly for trial upon the 21st day of April, 1923, being a day in the March, 1923, term of said Court, before the Court sitting without a jury, a trial by jury having been specially waived by written stipulation filed; Thomas E. Haven, Esq., appearing as attorney for plaintiff and Fred L. Dreher, Esq., appearing as attorney for defendant; and the trial having been proceeded with and oral and documentary evidence upon behalf of the respective parties having been introduced and closed and the cause having been submitted to the Court for consideration and decision; and the Court, after due deliberation having filed its finding in writing and ordered that judgment be entered herein in accordance with said findings and for costs:

Now, therefore, by virtue of the law and by reason of the findings aforesaid, it is considered by the Court that Washington Dehydrated Food Co., a corporation, plaintiff, do have and recover of and from Garcia & Maggini Co., defendant, the sum of Five Thousand Five Hundred Twenty-two and 96/100 ($5,522.96) Dollars, together with its costs herein expended taxed at $92.60.

Judgment entered April 27, 1923.

WALTER B. MALING,
Clerk. [22]

(Title of Court and Cause.)

**Certificate to Judgment-Roll.**

I, Walter B. Maling, Clerk of the United States District Court for the Northern District of California, do hereby certify that the foregoing papers hereto annexed constitute the judgment-roll in the above-entitled action.

Attest my hand and the seal of said District Court, this 27th day of April, 1923.

[Seal] WALTER B. MALING,
Clerk.
By J. A. Schaertzer,
Deputy Clerk.

[Endorsed]: Filed April 27, 1923. Walter B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [23]

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United States District Court, California.

WASHINGTON ETC. CO.

vs.

GARCIA & MAGGINI CO.

**(Opinion.)**

In this action for breach of contract is no conflict in the evidence, but only in the inferences of fact and upon which depend plaintiff's right to and the amount of damages. The contract was made by and between plaintiff and defendant for sale and delivery of 60,000 pounds of dried apples at 19 cents per pound, delivery elected by plaintiff in

January, 1920. Plaintiff duly tendered delivery, but defendant contends of improper variety and that on its complaint they agreed to and did rescind the contract. At the time of and subsequent to tender were written communications between the parties, in which defendant rather strategically sought to impress plaintiff with the idea that therein the latter had agreed to rescind; but plaintiff repudiated that version of its language and acts and insisted upon the contract.

Defendant now contends for rescission in its claim therefor acquiesced in by plaintiff, which acquiescence plaintiff denies. It appears that upon plaintiff's tender of the apples, defendant asserted they were not the variety of the contract and refused to accept delivery. The next day plaintiff telegraphed defendant "we understand your wire * * * cancels order for car apples. Is this correct," to which the same day defendant by wire answered yes "as tender made by you cancels contract." Four days later, plaintiff wrote defendant the tender complied with the contract, "therefore none of the contentions in your correspondence are valid," and upon defendant answering that by plaintiff's aforesaid telegram of Jan. 24, plaintiff "agreed to cancellation": eleven days later plaintiff replied it had not so agreed and if defendant did not send shipping directions, plaintiff would sell the apples and bring suit for [24] "any difference." Rescission by claim thereof by one party acquiesced in by the other, appears from conduct of the latter, (1) affirmative acts inconsistent with continuance of the contract or (2)

negative acts of silence or delay calculated to and that do inspire the claimant of rescission with belief of consent, and upon which he acts or fails to act to his prejudice if the fact be otherwise, a variety of estoppel. In principle rescission by acquiescence has no other support or justification. That is not this case and there was no rescission. In the matter of resale of the apples, plaintiff immediately proceeded altho giving reasonable opportunity to defendant for reconsideration of its refusal of delivery. The time was February, 1920, and plaintiff was confronted by a poor, inactive and declining market aggravated by historical deflation and by like merchandise by the United States returned from Europe and thrown upon the market. All usual and reasonable and other ways and means were employed by plaintiff to accomplish resale, its manager even travelling extensively and to some of the great markets for dried fruits, but without avail until July 30, 1920, resale was made at the best price obtainable at 11¾ cents per pound. It appears plaintiff at the same time had three cars of like apples for sale, that this car of the contract was the first it succeeded in selling in 1920, and that it succeeded in selling its three cars only about a year later and for not slightly in excess of 5 cents per pound.

Having elected the remedy of resale, it was plaintiff's right and duty to resell in reasonable time. That is not determined by length of time alone in any case, but from a consideration of all circumstances of which elapsed time is one. See

cases, 42 L. R. A. (2) 683; Peck vs. Co. (La.) 59 So. 113, two years. Having notified defendant it would resell, plaintiff in a hunt for a market and a purchaser, was under no obligation to also give notice of time and place. Mechem, Sales, § 1637. The circumstances of this case require the inference that the resale was duly made in [25] reasonable time, as soon as reasonably practicable by a diligent, competent and prudent salesman and vendor inspired by honesty of purpose and fair consideration for the vendee as well as for the vendor.

In the matter of damages, intermediate defendant's default and resale, plaintiff segregated the apples in a warehouse, and thereon paid storage $300 and insurance $121.44. It also expended for its manager's travel in behalf of resale and also its three cars, $1,400. Altho, some dissent, by the weight of authority plaintiff is entitled to recover storage found reasonable and necessary, but obviously not travel expenses. See Penn vs. Smith, 93 Ala. 476. Nor is it entitled to recover insurance which so far as appears was exclusively for plaintiff's benefit and would benefit defendant not at all 26 C. Jur. 437. As payment was due 30 days after draft for the price, plaintiff is reasonably entitled to legal interest at the Washington (place of the contract) rate, from March 1, 1920, upon the difference between the contract price and the resale price, or $4,350, and likewise upon the cost of storage or $300 from July 30, 1920.

The parties may compute the amount thus found to be due plaintiff from defendant, and judgment accordingly is rendered.

April 26, 1923.

BOURQUIN, J.

[Endorsed]: Filed April 26, 1923. Walter B. Maling, Clerk. [26]

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In the Southern Division of the District Court of the United States, for the Northern District of California, Second Division.

No. 16,703.

WASHINGTON DEHYDRATED FOOD CO., a Corporation,

Plaintiff,

vs.

GARCIA & MAGGINI CO., a Corporation,

Defendant.

**Defendant's Engrossed Bill of Exceptions.**

BE IT REMEMBERED that heretofore and after issue properly joined, the above-entitled cause came on for trial before said Court at a stated term thereof, holden in the city and county of San Francisco, State of California, in the Southern Division of said United States District Court in and for the Northern District of California, Second Division and on, to wit, the 21st day of April, 1923, oral and documentary evidence was presented on behalf of said plaintiff and on behalf of the said defendant and that the following proceedings, and none other, were had upon the hearing and trial of the said cause:

**Testimony of Ira D. Cardiff, for Plaintiff.**

IRA D. CARDIFF, a witness for plaintiff, heretofore sworn, testified as follows:

I am at present and ever since the organization of the Washington Dehydrated Food Company, a corporation, have been connected with the said corporation. On June 13, 1919, the date of the contract sued upon in this action, I was the general manager for the plaintiff corporation and am now the [27] president and manager. I have been manager of the corporation since its organization and am familiar with the negotiation of the contract sued on in this case and subsequent events in connection with an attempt on the part of the plaintiff to perform it. The business of the plaintiff is chiefly the manufacture of and dealing in dried fruits. Its central office is located at Yakima, State of Washington, and it also has an office at Wenatchee. At the time the contract was entered into it had offices also at Walla Walla and Grand View. As manager of the corporation I had occasion to become familiar with the market for dehydrated or dried apples, also called evaporated apples, in the State of Washington and elsewhere. My business required me to keep in touch with the market in general throughout the country and especially the Washington market and I have devoted a great deal of time to familiarizing myself with such markets. That was one of my chief duties.

The time of shipment designated in the contract

(Testimony of Ira D. Cardiff.)

sued upon herein is December or January, and means shipment during December, 1919, or January, 1920, and this was the understanding of the parties. I am familiar with the time and the manner under which the plaintiff attempted to fulfill the contract. On the 13th day of January, 1920, we in writing first requested the defendant for shipping instructions; on January 13, 1920, we sent the following letter to the defendant, which was admitted in evidence as

**Plaintiff's Exhibit No. I.**

"WASHINGTON DEHYDRATED FOOD CO.
Yakima, Washington.
January 13, 1920.

Garcia & Maggini Co.,
232 Drumm St.,
San Francisco, Calif.

Gentlemen:

If we are able to secure a car we shall probably be able to load the car of dried apples ordered from us [28] the latter part of this week. Inasmuch as you have never given us any shipping instructions upon this fruit will ask you to wire us immediately upon receipt of this letter your pleasure with reference to acceptance and shipment. Should you elect to inspect these apples at time of loading rather than accept our grades we

(Testimony of Ira D. Cardiff.)

would advise that the apples will be loaded from our Wenatchee factory.

Yours very truly,

WASHINGTON DEHYDRATED FOOD CO.

IRA D. CARDIFF,

General Manager."

IDC:HC.

"Mr. HAVEN.—I suppose, Mr. Dreher, it may be stipulated that the original correspondence, the letters coming to you, came in due course of mail from the plaintiff; and we will stipulate that the originals we have came from the defendant in due course of mail.

"Mr. DREHER.—Yes."

The following letter was received from defendant on the letter-head of defendant in reply to Plaintiff's Exhibit No. 1, which said letter was admitted in evidence as

**Plaintiff's Exhibit No. II.**

Jan. 16, 1920.

Washington Dehydrated Food Co.,

Yakima, Wash.

Gentlemen:

Replying to yours of the 13th, we will ask that you kindly mail us at once a sample of the apples you propose to deliver to us and to kindly advise us if in the event of our deciding not to ship the car now, what facilities there are for storage at Wenatchee.

Thanking you for giving this your prompt attention, we beg to remain,

Yours very truly,
GARCIA & MAGGINI,
Per A. ASHER.

AA:LH. [29]

We then wired the defendant asking definitely for shipping instructions as follows: Said wire was admitted in evidence as

**Plaintiff's Exhibit No. III.**

"A. 915 F. U. T. 8.

K. M. Yakima, Wn., 1912.
P. Jan. 17, 1920.

Garcia and Maggini Co., 104.
San Francisco, Calif.

Please wire immediately shipping instructions on car fruit.

WASHINGTON DEHYDRATED FOOD CO."

In response to the last wire we received the following reply from the defendant, which was admitted in evidence as

**Plaintiff's Exhibit No. IV.**

102 E. A. KG. 21 Night.

Jan. 17, 1920.

Washington Dehydrated Food Co.,
Yakima, Wash.

Referring wire even date writing fully under separate cover Stop Under no circumstances make shipment until you hear definitely from us.

GARCIA & MAGGINI.

We then wrote to defendant under date of January 20, 1920, as follows: Said letter was admitted in evidence as

**Plaintiff's Exhibit No. V.**

WASHINGTON DEHYDRATED FOOD CO.
Yakima, Washington.
January 20, 1920.

Garcia & Maggini Co.,
232 Drumm St.,
San Francisco, Calif.

Gentlemen:

We are in receipt of your favor of the 16th. In reply will state that we are wiring our Wenatchee office to send you immediately a 10 lb. sample of the fruit in question. We have also asked them to look up storage facilities and shall advise [30] you as soon as this information is available.

Yours very truly,
WASHINGTON DEHYDRATED FOOD CO.
IRA D. CARDIFF,
IDC: HC. General Manager.

We then sent the following wire to defendant: Said wire was admitted in evidence as

**Plaintiff's Exhibit No. VI.**

WESTERN UNION TELEGRAPH CO.

A. 1040 SF. KG. 32 BLUE
KW. Yakima, Wash., 12 P. Jan. 22, 1920.

Garcia & Maggini,
San Francisco, Calif.

Can secure storage your fruit good brick warehouse responsible firm Wenatchee six cents per box

first month one cent per box each succeeding month (Shall we store here for you) Wire promptly.

WASHINGTON DEHYDRATED FOOD CO.

In reply to the last wire and in reply to our letter of the 20th of January, 1920, we received the following wire: Said wire was admitted in evidence as

**Plaintiff's Exhibit No. VII.**

143 E. A. N.–39 NL.

San Francisco, Calif., Jan. 23, '20.

Washington Dehydrated Food Co.

Yakima, Wash.

Referring your letter twentieth and wire twenty-third you are tendering us Choice Wenatchee stock whereas you sold us car Choice Yakima from your Yakima Evaporator Stop We sold Yakima and cannot tender our buyer Wenatchee therefore cannot accept.

Charge.

G&MCo. GARCIA & MAGGINI CO.

We received the following letter on the stationery of the defendant, January 24, 1920: Said letter was admitted in evidence as

**Plaintiff's Exhibit No. VIII.**

Jan. 24, 1920.

Washington Dehydrated Food Co.,

Yakima, Wash.

Gentlemen:

We are in receipt of your letter of the 20th in [31] which you say that you are wiring your Wen-

atchee office to send us a 10# sample of the fruit in question, in other words, a 10# sample of what you intend to deliver to us on contract calling for car of Choice grade. You also state that you have asked them to look up storage facilities.

We have their wire of the 23rd reading—"Can secure storage your fruit good brick warehouse responsible firm Wenatchee six cents per box first month one cent per box each succeeding month shall we store here for you promptly wire."

Now we are very much disappointed that you should have tendered us a car of Wenatchee apples as on June 22nd. we bought of you a car of your Yakima Choice Grade, from your Yakima plant and sold Yakima and our buyer will not accept Wenatchee.

You cause us all kinds of trouble in changing our contract originally calling for Oct/Nov to Dec/Jan and we have that fixed up with the buyer and now comes along a substitution of Wenatchee for Yakima.

We certainly have had our troubles on this car of apples and if we buy another car next year, we hope for smoother sailing.

As explained in our wire, we cannot deliver Wenatchee for Yakima and for the above reason cannot accept the car in question.

Regretting that we could not accept, we beg to remain

Yours very truly,
GARCIA & MAGGINI CO.

AA: LH Per————.

There is virtually no difference between Yakima apples and Wenatchee apples; both classes of apples are grown all throughout the central Washington district. One district is sort of generally known as the Wenatchee District and the other is generally known as the Yakima District. At the time of the contract we shipped all such apples as Yakima apples, and Yakima apples is a general name applied to all central Washington apples and are known by that designation to the trade.

On January 28, 1920 we sent the following letter to the defendant: Said letter was admitted in evidence as

**Plaintiff's Exhibit No. IX.**

WASHINGTON DEHYDRATED FOOD CO.

Yakima, Washington,

January 28, 1920. [32]

Garcia & Maggini Co.
232 Drumm St.,
San Francisco, Calif.

Gentlemen:

We are in receipt of your letter of the 24th. In connection with this matter, we have looked over carefully our wires and letters with reference to the car in question, and do not find any place that we have not tendered you Yakima apples. Attached hereto you will find a label such as the boxes in the car in question all carried. The car, by the way is Extra Choice, not Choice as you have assumed.

At any rate, your contract did not call for Yakima apples, therefore none of the contentions in your correspondence are valid.

Yours very truly,
WASHINGTON DEHYDRATED FOOD CO.
IRA D. CARDIFF,
IDC: HC. General Manager.

We enclosed in the last-mentioned letter the following label: Said label was admitted in evidence as

**Plaintiff's Exhibit No. X.**

WASHINGTON.

FRUIT

Net weight when Packed
50 Pounds
Retaining all Fruit
Salts
Flavors
Sugars
And Vitamine

EXTRA CHOICE
The Whole
Properties of
the Apple
Minus the
Water

Hero DEHYDRATED

Brand YAKIMA APPLES
Manufactured by
Washington Dehydrated Food Co.
Yakima, Wash.

On February 13, 1920 we forwarded to defendant the following letter: Said letter was admitted in evidence as

**Plaintiff's Exhibit No. XI.**

February 13, 1920.

Garcia & Maggini,
232 Drumm St.,
San Francisco, Calif.

Gentlemen:

Replying to your letter of the 2nd will state that we have looked carefully through our correspondence and fail to find anything in the same where we have agreed to the cancellation of your order for a car of apples. [33]

You made a definite contract for a car of apples which was tendered you within the time limit of the contract and we shall expect you to take delivery of the same. Unless we receive shipping instructions from you on the car in question within a few days we shall sell the same and charge any difference to your account, bringing suit to cover.

Yours very truly,
WASHINGTON DEHYDRATED FOOD CO.
By IRA D. CARDIFF,
IDC:D. Mgr.

After we mailed the letter of February 13, 1920, we made an attempt to sell the evaporated apples. We offered them for sale at virtually all centers where evaporated apples were handled throughout the country, chiefly through brokers and, in a few cases, direct to jobbers. Offers were made by telegrams and some few by letters. We sell evaporated apples all over the United States and in foreign countries too, in carload lots, and chiefly through

(Testimony of Ira D. Cardiff.)

brokers, which is the usual method of disposing of carload lots. Immediately after sending the letter of February 13, 1920, we took steps looking to the sale of the rejected carload of apples. I was very familiar with the condition of the market for such apples at or about February 13, 1920, chiefly in the northwest, but I was also familiar with conditions throughout the country. At that time and now am familiar with what the market was at the times referred to.

"Q. What was the condition of the market in the Northwest and throughout the country at the time of the date of this letter, February 13, 1920, and also on January 24, 1920, if there was any difference?

"Mr. DREHER.—If the Court please, I object to the question as immaterial, irrelevant and incompetent, and if there is any breach of a contract here the market price as of the date of the breach, the date of delivery, should cover, and not sometime subsequent, which is February 13th.

"Mr. HAVEN.—January 24th was the date of the first refusal.

"The COURT.—It would be the price at or about that time. Of course, the real price upon which the damages would be based [34] would be the price that he received, assuming, of course, due diligence and good judgment in the sale. It would not be the exact price on the day of the breach. It depends, of course, upon what you call the day of the breach. He may answer the question; in so far as it is not

(Testimony of Ira D. Cardiff.)

material or competent, the Court will give it no consideration in making up its decision. For the record, the objection will be overruled and an exception may be noted.

A. There was no such thing as a market at that time, in the generally accepted use of that term in the trade. The market was dead."

EXCEPTION No. 1.

The chief reason for the fact that there was no such a thing as a market for evaporated apples at that time was because the United States Government was bringing back evaporated apples and fruits from Europe and throwing them on the market in large quantities for anything that was offered for them. Such conditions prevailed during the months of January, February, March, and April of 1920. During the months of January and February, 1920, I did not succeed in making a sale of the rejected apples. We continued our efforts to sell them. We wrote and wired first offering at prices, then reduced prices, and finally solicited brokers and dealers to make us an offer on them. We received no offers and could get no offer of any kind. In May the Board of Directors of the plaintiff corporation sent me east or throughout the country to make an effort to sell the rejected carload and three other cars of similar product which we had on our hands and which belonged to us. I made a trip to all the centers where dried fruit is sold in the country, virtually from Denver and Billings to Boston and all intervening territory, travelling it over several

(Testimony of Ira D. Cardiff.)

times. I was gone more than two months making an effort to clear up this fruit and in the latter part of July we sold a car to Libby, McNeill & Libby at Chicago for eleven and three quarter cents (11–3/4¢) per [35] pound, f. o. b. Pacific Coast shipping point, which was the same condition as to shipment as in the contract sued upon herein. That was the first carload of apples we sold that calendar year. We had been endeavoring to make such a sale all that year. The contract called for sixty thousand (60,000) pounds net at nineteen cents for Extra Choice. We received for these sixty thousand (60,000) pounds upon the resale eleven and three quarter cents per pound, or the sum of Seven Thousand Fifty (7050) Dollars. The total contract price was Eleven Thousand four Hundred (11,400) Dollars. I sold more than sixty thousand pounds to Libby, McNeill & Libby on that trip. The sale to the last-mentioned firm did not designate any definite poundage and accordingly when I sold a carload lot to Libby, McNeill & Libby, I instructed our house to get the largest car and fill it full. The warehouse got something like seventy thousand (70,000) pounds in the car. The evaporated apples sold to Libby, McNeill & Libby were the specific apples contracted to be sold to the defendant and had been segregated in our warehouse by setting them aside in a block by themselves. We had notified the defendant that we had so set them aside for them. In the sale of these apples and in the storage thereof, we incurred warehouse expense and insurance and we had to pay

(Testimony of Ira D. Cardiff.)

interest in the sum of Five Hundred One and 60/100 Dollars. In our letter of September 25, 1920, we attached an invoice, made up under my direction, setting forth the items of our expense. Said letter was admitted in evidence as

**Plaintiff's Exhibit No. XII.**

WASHINGTON DEHYDRATED FOOD CO.

Yakima, Washington.

September 25, 1920.

Garcia & Maggini Co.

San Francisco, California.

Gentlemen:

We have just sold the car of evaporated apples, the order for which you attempted to cancel in your wire of January 23rd, and for which you refused to pay our draft #120, under date March 6th. These apples were finally sold at 11–3/4¢ per pound. You, therefore, are indebted to us as per attached [36] invoice.

Will thank you for your prompt remittance to cover, and in case, as you have intimated in your previous letters, that you do not intend to abide by your contract for this car of fruit, we will ask that our differences on the contract be immediately submitted to arbitration in Seattle.

Thanking you for your prompt attention to this, we remain,

Yours very truly,

WASHINGTON DEHYDRATED FOOD CO.

By IRA D. CARDIFF,

IDC: GC. Manager.

(Testimony of Ira D. Cardiff.)

We never received any answer from the defendant to our letter of September 25, 1920.

"Mr. HAVEN.—I call attention to the fact, your Honor, that the contract contains an arbitration clause, upon the back of it, providing that under certain conditions arbitration shall be had before certain bodies."

The witness continued: I am familiar with the expenses in the invoice and I know that they were necessarily incurred in connection with the car of these apples, after the refusal to accept them and prior to their resale. Said invoice was admitted in evidence as

**Plaintiff's Exhibit No. XIII.**

Statement of Account with—

WASHINGTON DEHYDRATED FOOD CO.

Yakima, Wash. Sept./24, 1920.

Garcia & Maggini Co.

San Francisco, Calif.

| Date | | Debits. | Credits. |
|---|---|---|---|
| 1920 | First tendered 1/17/20 Fruit placed in storage and draft for G&M account 3/6/20..... | | |
| March 6th | To balance..... | | |
| | 1200 boxes Ex. Ch. Evap. apples..... | | |
| | To Merchandise. | | |
| | 60000 # @ 19¢ ..... | 11400.00 | |
| | Protest fee on draft.. | 5.00 | |

(Testimony of Ira D. Cardiff.)

| | | |
|---|---|---|
| | Storage 5 mo. @ 2.00 per ton per mo. .... | 300.00 | |
| | Insurance Premium 5 mo. ..... | 121.44 | |
| | Interest on $11400 6 mo. and 18 days at 8% | 501.60 | |
| Sept. 24th. | Credit by sale of car @ 11-3/4¢ ..... | | 7050.00 |
| | | $12328.04 | $7050.00 |
| | Balance ..... | | $5278.04 |

Q. Do you know whether or not you incurred storage charges? A. We did. [37]

Mr. DREHER.—I object to that as immaterial, irrelevant and incompetent, because that would not be an item of damage.

The COURT.—As the Court stated heretofore, it will be admitted, and if not competent or material it will receive no consideration. The objection is overruled and an exception may be noted. The witness has answered the question.

Mr. DREHER.—At this time in order to save time, possibly, may it be understood that my objection will run to all these questions with reference to the items of expense incurred by the plaintiff corporation?

The COURT.—Yes, it will, and the record may show the fact.

Mr. HAVEN.—Q. Can you state what the storage charge incurred upon these apples was during

(Testimony of Ira D. Cardiff.)

the period that I have mentioned, after the rejection or refusal to accept, and prior to the sale?

A. If I recall it, the invoice is five months at $2.00 per ton month.

Q. How many tons were there? A. 30 tons.

Q. The total amount of storage, then, would be how much? A. $300.00.

Q. Was that the usual storage rate at the place where these apples were stored?

A. We were buying storage right along there, and we were paying from $2. to $3.20 per ton, or something like that we gave them the benefit of the lowest storage.

Q. You charged them the minimum amount that you, yourself, were paying at Wenatchee; is that it? A. That is correct.

Q. In the invoice that you have in your hand, and which is referred to in this letter, you also included an item of interest; how do you compute that?

A. The interest on $11,400 for six months and eighteen days at eight per cent.

Q. That time ran from when?

A. That time ran from the time that the apples were definitely tendered—whatever that letter shows, about the 1st of February, until we received the money for them from Libby, McNeill & Libby, on September 24th.

Q. That is when you received the money from the amount of the sale you made to Libby, McNeill & Libby? A. That is correct.

(Testimony of Ira D. Cardiff.)

Q. How much was the interest that you figured in that manner?

A. $501.60. We figured interest at 8% because we were obliged to pay that rate.

EXCEPTION No. 2.

On October 14, 1920, we wrote defendant the following letter, to which we received no reply. Said letter was admitted in evidence as

**Plaintiff's Exhibit No. XIV.** [38]

Yakima, Wash. October 14, 1920.

Garcia & Maggini,

San Francisco, California.

Gentlemen:

We wrote you several weeks ago with reference to your account with us, but to date have received no reply. We will ask you, therefore, to give this matter your early attention and advise us what you expect to do with reference to this account.

Yours very truly,

WASHINGTON DEHYDRATED FOOD CO.

By IRA D. CARDIFF,

Manager.

Q. You stated, Doctor, you were endeavoring to sell some cars of apples belonging to your company, as well as these covered by this contract; when, if at all, did you sell these other cars?

A. The bulk of them were sold almost a year later.

Q. During the intervening time, what, if any, effort did you make to sell those apples?

(Testimony of Ira D. Cardiff.)

Mr. DREHER.—That is objected to as immaterial, irrelevant, and incompetent, and having no bearing on the issues in this case, and particularly having no bearing on the measure of damages.

The COURT.—What is the purpose of it?

Mr. HAVEN.—The purpose of it is to show good faith in making a sale of the other apples first, and that we made a continuous attempt to sell these apples.

The COURT.—Objection is overruled.

Mr. DREHER.—Exception.

A. We made constant and vigorous efforts to sell them.

EXCEPTION No. 3.

Mr. HAVEN.—Q. And you sold the others just as soon as you could, after having sold the apples under this contract, did you? A. Yes, sir.

Q. At what price did you sell them?

Mr. DREHER.—I object to the question as immaterial, irrelevant and incompetent, and having no bearing on the issue of damages.

The COURT.—I rather think so; still, he has advanced a theory that seems impossible on its face, yet I will allow the answer to go in; if not material, the Court will give it no consideration.

A. The Extra Choice grades, which was the same as those tendered, netted us slightly in excess of five cents per pound.

EXCEPTION No. 4. [39]

Mr. HAVEN.—Q. Speaking of Extra Choice grades, those are the character of apples referred to in the contract which is in controversy here?

(Testimony of Ira D. Cardiff.)

A. Yes.

Mr. DREHER.—That is assuming a fact not in evidence, your Honor.

The COURT.—The contract specifies Choice, with a provision for Extra Choice under certain circumstances.

Mr. HAVEN.—Q. Referring to the apples which you tendered to the defendant, and which the defendant refused to accept, and which you subsequently sold, as you testified, to Libby, McNeill & Libby, I ask you what grade of apples those were?

A. Extra Choice.

Q. Which one of the designated varieties or grades in this contract did the apples tendered comply with? A. The Extra Choice.

Q. At 19 cents a pound? A. Yes, sir.

Q. That is a well-known grade of dried apples, is it? A. Yes, a standard grade.

Q. Which of the two classes of apples, Yakima or Wenatchee, if there are two different classes, which of them, if either, would correspond to the apples designated in the contract as Extra Choice Apples?

A. We make Extra Choice and Extra Fancy, both at Wenatchee; occasionally we make Choice there; mostly Extra Choice, and Fancy, because at Wenatchee we were able to get a little better raw material, and, therefore, made a little better product.

Q. And if there was any difference between the products, the Wenatchee apples were a little better than the Yakima? A. Yes.

(Testimony of Ira D. Cardiff.)

Q. Your contract, under which you attempted to make delivery, called for Extra Choice apples; now, I ask you what apples which you were handling would correspond or fulfill the condition of your contract as Extra Choice apples?

A. The ones we tendered were Extra Choice apples.

Q. Were there any others?

A. We manufacture four grades of apples; Choice, Extra Choice, Fancy and Extra Fancy. The contract gave us the privilege of filling the order with either Choice, Extra Choice, or Fancy; we elected to fill it with Extra Choice.

Q. And you elected to fill it from Wenatchee, the correspondence shows.

A. That was merely a matter of convenience in warehousing.

Q. The correspondence shows some objection on the part of the defendant in filling it from Wenatchee rather than Yakima: What is the difference between those two?

A. There is none. We notified them that if they preferred to have them from Yakima they could have them.

Q. Would the apples from Wenatchee correspond to the designation just as much as the Yakima apples would? A. Certainly.

Mr. HAVEN.—I have here a letter from our firm, as attorneys [40] for the plaintiff, addressed to Garcia & Maggini, dated June 22, 1921, on the general subject in controversy. It is stipulated be-

(Testimony of Ira D. Cardiff.)

tween counsel that this letter renews the offer and the request for arbitration of the dispute. This was dated June 22, 1921; Garcia & Maggini have the original received about that time.

Mr. DREHER.—The stipulation is made in so far as the letter is competent; I do not think it has any bearing on the matter.

The COURT.—Very well.

Mr. HAVEN.—Take the witness."

Cross-examination.

There is no difference between the apples grown in the Yakima District and the apples grown in the Wenatchee District. The situation is thus; At Wenatchee we have very little competition or not nearly so much competition as we have at Yakima. We can therefore pick and choose better apples at Wenatchee than we can at Yakima and therefore we can get better quality raw material. The apples grown in the two districts are identical. The two districts are about 50 miles apart with a range of hills between. The apples manufactured at the Wenatchee plant come from the district immediately adjoining Wenatchee and those manufactured at the Yakima plant come from that vicinity. I did not personally attend to the segregation of the car of apples for the defendant company. I do not recall that I was in the warehouse when the segregation was taking place, but I was in there shortly after it had been done and saw the segregated material. It bore a warehouse tag designating what it was set

(Testimony of Ira D. Cardiff.)

aside for. The particular car segregated contained extra choice evaporated apples, but there were no choice evaporated apples at Wenatchee at the time referred to, but there were Choice Evaporated Apples at Yakima, about half a car to a car; at least half a car, as nearly as I can approximately estimate at this time. The car of apples for the defendant bore a label designating them as Yakima apples. All of our apples from the Wenatchee factory were designated as Yakima Apples at that time. Since then we have made a slight change in the label, but virtually all of the apples we have ever [41] shipped out of any of our Washington plants, whether from Walla Walla, Grand View, Wenatchee or Yakima, have been according to the label introduced in evidence.

Mr. DREHER.—Q. I believe there was some letters and some telegrams passing between the parties that were not offered in evidence. I have a telegram that was sent to us. Mr. Cardriff, I show you a carbon copy of a telegram which is purported to have been sent by your company to the Garcia & Maggini Company, and I ask you if that is a carbon copy of a telegram that you sent to Garcia & Maggini on January 24, 1920? A. It is.

Mr. DREHER.—I offer in evidence as Defendant's Exhibit "A," a telegram dated January 24, 1920, to Garcia & Maggini.

Mr. HAVEN.—One moment. I want to object to that. I object on the ground that it is not proper cross-examination. It is a part of the defendant's

(Testimony of Ira D. Cardiff.)

case, if at all. And as a part of the defendant's case it is immaterial, irrelevant and incompetent, because it does not prove or tend to prove the affirmative defense, and that is the only issue it is material on.

The COURT.—Well, I would have to hear it anyway in order to rule on the objection. I think it might be material as part of the general correspondence. Objection overruled.

Mr. HAVEN.—Exception.

Mr. DREHER.—It reads as follows: Said telegram was admitted in evidence as

**Defendant's Exhibit "A."**

POSTAL TELEGRAPH.

Jan. 24, 1920.

Garcia & Maggini,

San Francisco, Calif.

We understand your wire twenty-third cancels order for car apples. Is this correct. Wire.

WASHINGTON DEHYDRATED FOOD CO.

We received in reply the following wire from defendant: Said wire was admitted in evidence as

**Defendant's Exhibit "B."**

17 E. H. P. A. 20. 2:15 PM. Jan. 24, 1920.

San Francisco, Calif.

Washington Dehydrated Food Co.,

Yakima, Wash.

Replying your wire even date your understand-

(Testimony of Ira D. Cardiff.)

ing correct as tender made by you cancels contract dated June thirteenth nineteen nineteen.

GARCIA & MAGGINI CO.

2:43 PM. [42]

"Mr. HAVEN.—The same objection to this wire, your Honor.

The COURT.—Like ruling.

Mr. HAVEN.—Exception."

Q. Your counsel does not have the original of the letter addressed to you on February 2, 1920; I have the carbon copy. I ask you, do you recall receiving a letter of that nature on or about the date of that letter? A. What is the date?

Q. February 2, 1920. It might be stipulated, Mr. Haven, that you have a copy of this letter in your file, and that that file was given to you by Mr. Cardriff.

Mr. HAVEN.—Yes.

A. Yes, I think we received that all right.

Mr. DREHER.—We offer this in evidence, a carbon copy of a letter which may be introduced as the original, by stipulation, and ask that it be marked Defendant's Exhibit "C." It reads as follows:

**Defendant's Exhibit "C."**

Feb. 2, 1920.

Washington Dehydrated Food Co.
Yakima, Wash.

Gentlemen:

Acknowledging receipt of yours of the 28th, we

(Testimony of Ira D. Cardiff.)

refer you to your wire of Jan. 24th, wherein you agreed to cancellation of car of apples and asked us to advise you if your understanding was correct, namely, that the car was cancelled.

We replied to same saying, "Replying your wire even date your understanding correct, as tender made by you cancels contract dated June 13, 1919.

Respectfully yours,

GARCIA & MAGGINI CO.

Per AA.

AA:LN.

Mr. HAVEN.—I desire to have the same objection to that, your Honor.

The COURT.—There will be a similar ruling.

Mr. HAVEN.—Exception.

Mr. DREHER.—Q. I show you a letter dated March 6, 1920, signed by yourself, addressed to Garcia & Maggini, and I ask you if that letter was signed by you and mailed to the defendant in this action? A. Yes, sir.

Mr. DREHER.—We offer in evidence, as Defendant's Exhibit "D," this letter:

**Defendant's Exhibit "D."** [43]

WASHINGTON DEHYDRATED FOOD CO.

Yakima, Washington.

March 6, 1920.

Garcia & Maggini Co.,
232 Drumm St.,
San Francisco, Calif.

Gentlemen:

Not having received any definite shipping in-

(Testimony of Ira D. Cardiff.)

structions from you with reference to the car of apples purchased from us, we are drawing upon you for this car to-day with warehouse receipt attached to draft. We shall expect this draft to be taken up immediately.

In case you have a real preference for apples from our Yakima plant, we will ask you to advise us by wire and we shall withdraw the above draft and issue a new draft and warehouse receipt from Yakima. However, in doing this, we should want to ship approximately half the car Choice and half Extra Choice, instead of all Extra Choice as in the case of the Wenatchee shipment.

Yours very truly,

WASHINGTON DEHYDRATED FOOD CO.

IRA C. CARDIFF,

General Manager.

IDA:HC.

WITNESS.—(Continuing.) In our letter of September 25th we stated "We have just sold a car of apples." As a matter of fact, the car was sold on July 30, 1920, but we collected the money on the date mentioned on the invoice, the 24th of Sept., 1920.

**Testimony of Arthur C. Oppenheimer, for Defendant.**

ARTHUR C. OPPENHEIMER, a witness for defendant, heretofore sworn, testified as follows:

I am vice-president and general manager of Rosenberg Bros. & Co., who has been engaged in

(Testimony of Arthur C. Oppenheimer.)

handling dried fruits for twenty-six years and was in that business during the years 1919, 1920. It has been my business and custom to keep in touch with the market, market prices and conditions of dried fruits of all kinds. I am familiar with the market conditions, with particular reference to evaporated apples during the years 1919 and 1920. Some old records which I have with me reflect the market conditions existing with reference to evaporated apples during 1919 [44] and 1920, but I cannot remember back to those years.

Q. What would you say was the fair market price of evaporated apples, choice grade, during the month of January, 1920?

Mr. HAVEN.—That is objected to as immaterial, irrelevant and incompetent, first because the place is not specified; second, because the witness' statement is that he has gone over some old records, and it does not appear who kept the records; third, that the market price is entirely immaterial because it appears that the plaintiff sold the apples, and that fixes the measure of damages, after having served notice on the defendant. The measure of damages is fixed by what could be obtained by a fair sale in the usual manner. It is not material what the market price was at that time.

The COURT.—A range of prices might be shown. They are not bound to accept your conclusion that you sold at the proper price at the proper time. The objection is overruled. In so far as it is not

(Testimony of Arthur C. Oppenheimer.)

material, the Court will give it no consideration. I think there ought to be some price fixed, however.

Mr. DREHER.—Very well, your Honor.

WITNESS.—(Continuing.) Washington apples usually bring a little higher price than California apples, but a great many times they are sold on the same basis.

"Mr. DREHER.—Take the price prevailing for Wenatchee apples, or Yakima apples at Wenatchee, and the price of the same apples at San Francisco, how would the market vary—would there be any relation between the various prices at the same time, or would it be all on the same basis?

A. Practically on the same basis. Sometimes the Washington apples bring more than the California apples.

Q. Would that be an f. o. b. price?

A. An f. o. b. price."

At the end of January, 1920, the fair market value [45] of Choice Evaporated Apples from the Washington District f. o. b. Pacific Coast shipping points, was between seventeen and nineteen cents, both for Choice and Extra Choice grades. The market value for evaporated apples f. o. b. Pacific Coast shipping points was lower in February, 1920, than it was in January, about a cent to two cents per pound lower.

(It was stipulated that all the above evidence was received subject to the same objection by Mr. Haven as above stated.)

(Testimony of Arthur C. Oppenheimer.)

Cross-examination.

My testimony as to market price is based on world conditions. I would not say there was an active market in January and February, 1920, a world market for dried or dehydrated apples. January is not an active apple market. The market grew worse in 1920, and from January, 1920, on, the market for evaporated apples went down all the time and kept going down. It grew worse in February. I cannot recall the July market value right now. I cannot recall it because I have not looked up records. The information I have given is based on actual sales made in January and February, 1920. I have the contracts of sale with me. The market price for dehydrated apples during March, 1920, was about fourteen cents. I do not know what the market was in April because I have not looked up records any further than March. My knowledge of the market prices is based upon actual sales which make the market. Some of these sales were carlots and some less than carlots. In March, 1920, it was very difficult to sell any carload lots of dried apples, but we sold some carload lots in January and February, 1920. We sold about three cars in January, 1920, and two cars in February, 1920. These sales and [46] deliveries were not made on contracts entered into prior to January, 1920. We start the new business off with January deliveries and always try to have deliveries attended to under previous contracts before the

(Testimony of Arthur C. Oppenheimer.)

first of January. All of the contracts, concerning which I have been just testifying, and upon which deliveries were made, were made after the first of January, 1920. On January 8, 1920, we sold twelve hundred boxes of evaporated apples at eighteen cents a pound. On February 17, 1920, seventy-six thousand pounds were sold at 15½¢ per pound. They were all sales in carload lots and made in San Francisco. The amount of sales of carloads of apples made in a month depends entirely upon the market. January and February are not good apple months at any time. The market price in the latter part of January, 1920, was very much less than it was in the latter part of the month of January, 1919. My testimony is based on the contracts I have with me and the knowledge I have of the business, buying and selling apples at all times and, of course, brushing up my memory by going through these contracts. My firm has had some disputes with the plaintiff over similar contracts, but they were all settled amicably and in our favor.

Redirect Examination.

The grade of apples sold February, 1920, 76,000 lbs., at 15½¢ a pound, were of different grades. Some were Extra Choice and some not full Extra Choice. On January 8, 1920, we sold 1200 boxes of Extra Choice evaporated apples at 18¢. There are 1200 boxes in a car.

**Testimony of Pauline Bartholme, for Defendant.**

PAULINE BARTHOLME, witness sworn on behalf of defendant testified as follows:

I am secretary to the publisher of the "California Fruit [47] News." The concern with which I am connected keeps a record of the market conditions and the market prices of dried fruits. It publishes a trade paper giving market prices on all dried fruits. In order to gather the information for the purposes of this publication the publisher calls on the trade, gets their various prices, and then gets a running market price and publishes that as the market price of the week. This has been our custom since 1883. The publication is made regularly every week.

"Q: Have you the records showing the market price, the market value of evaporated apples during the months of January and February, 1920,—f. o. b. prices? A. Yes, f. o. b. California.

Q. Let me see what you have there, please. Refer to the latter part of January, 1920.

A. The January 31st issue.

Q. The file you have referred to here, 'Apples,' that refers to evaporated apples, does it?

A. Evaporated apples; yes, sir.

The COURT.—If you mean to offer it, counsel proceed.

Mr. DREHER.—I offer in evidence, if the Court please, the issue of the 'California Fruit News,' as of January 31, 1920, showing the quotations on

(Testimony of Pauline Bartholime.)

evaporated apples: Choice in 50 pounds at 17½ cents; extra choice, 50 pound boxes, 18¼; fancy, 50 pound boxes, 20 cents.

Mr. HAVEN.—I object to that as immaterial, irrelevant and incompetent, in as much as it does not appear upon what information this publication is based, and, for that reason, it is hearsay.

The COURT.—I have no doubt it is like the ordinary market reports in all newspapers; as far as that is concerned, the objection is overruled.

Mr. HAVEN.—It is objected to further, if I may state my objection, that it is immaterial, irrelevant and incompetent.

The COURT.—In so far as it is not competent, the Court will give it no consideration.

Mr. HAVEN.—In that it does not relate to any issue in this case, and is no proof of the amount of damages.

The COURT.—The objection is overruled. [48]

Mr. DREHER.—Q. The next issue is what?

A. February 7.

Mr. DREHER.—We offer in evidence the issue of the paper showing choice apples in 50 pound boxes, 17¼ cents; extra choice, 50 pounds, 18 cents; fancy 20 cents; f. o. b. California shipping points.

Mr. HAVEN.—It may be considered that my objection runs to all these?

Mr. DREHER.—Yes.

The COURT.—What do you mean 'f. o. b. California shipping points'?

(Testimony of Pauline Bartholime.)

Mr. DREHER.—Placed in cars for shipment, for eastern shipment or for shipment to some other point.

The COURT.—That is the California price?

Mr. DREHER.—That is the California price. The last witness stated that the f. o. b. price, Pacific Coast Shipping point, whether it is Wenatchee, Yakima, or San Francisco, would be the same.

The COURT.—It would not be if you were going to buy your apples at Wenatchee and ship them down here.

Mr. DREHER.—That is very true, your Honor, but if they are purchased for eastern points the prices would be the same that the last witness testified.

The COURT.—Where were these apples in suit to be delivered?

Mr. DREHER.—It does not say. My witnesses are taken out of order, your Honor; the next witness will take that matter up.

The COURT.—Very well, proceed.

Mr. DREHER.—The next issue is the 14th of February; the price for choice, 50 pound boxes, 17; extra choice 17½; fancy, 20.

For February, 1921, the price of choice is 16 to 16½; extra choice 16½ to 17; fancy, 18½ to 19.

That is all."

Cross-examination.

I do not personally know where the information came from upon which the market price in our publication is based. I did not get it—the publisher

(Testimony of Pauline Bartholime.)

got it. I am secretary of the concern and have charge of the office. I do not know whether sales of dehydrated apples were actually made at the prices set forth in our publication. I do not know anything about the sales. [49]

"Mr. HAVEN.—While this is here, I offer the record for the subsequent months in 1920. The last one put in was February 21, 1920. I also offer in evidence, in connection with the evidence of this witness the preliminary reports in connection with these tabulations, in the issue of February 21, 1920, the publication stating: 'A very quiet dried fruit market is ruling in California, as is practically every variety in this line this week. Inquiry is small, and holders of goods are inclined to shade values to affect prices.'

"I read from the issue of February 14, 1920, from which quotations have been made: 'Generally speaking, the dried fruit market is easy.'

"Reading also from the issue of February 7, 1920: 'The spot dried fruit market is rather uninteresting and quiet at the moment.' "

"The defendant offered the record up to February 21, 1920. I now offer the record for the subsequent issues.

The COURT.—To what extent?

Mr. HAVEN.—I am offering first—

The COURT.—To what extent do you propose to offer them?

Mr. HAVEN.—You mean how far?

The COURT.—Yes.

(Testimony of Pauline Bartholime.)

Mr. HAVEN.—Down to the date of our sales.

The COURT.—You must produce it in some condensed form. We will not sit here and listen to the reading of all that. It is not proper cross-examination.

Mr. HAVEN.—May I offer up to the 1st of March?

The COURT.—Very well.

Mr. HAVEN.—Under the issue of February 28, 1920: 'An exceedingly quiet market continues in dried fruit generally, both California and elsewhere. A small supply only available here from first hand.'

The price in this issue of February 28, 1920, is as follows: 'For Extra Choice in 50's, 16 to 16½.'

In order not to take the time of the Court I will ask to read into evidence the quotation on April 17, 1920. Extra Choice, 13¼.

Skipping another month, to May 22, 1920, the quotation at that time was 12 cents.

I offer to read from the publication of July 17, 1920, this, in which extra choice were quoted at 11¾.

That is all." [50]

**Testimony of Ira D. Cardiff, for Plaintiff (Recalled in Rebuttal).**

IRA D. CARDIFF, a witness for plaintiff heretofore sworn, being recalled for rebuttal testified as follows:

I am familiar with the market quotations which have been read from this publication, but whether

(Testimony of Ira D. Cardiff.)

or not sales are made at the figures and upon the market quotations read from the publication depends upon the market conditions. If the market is good, sales are frequently made and, in fact, usually are, under those quotations, but it is to the interest of the people giving that information to the publication to keep the quotations as high as possible.

## SPECIFICATION OF PARTICULAR ERRORS OF LAW.

### I.

That the Court erred in admitting evidence over the objection of defendant and in not sustaining defendant's objection to the offer of plaintiff to show the market conditions of dehydrated apples in the northwest and throughout the country on the 13th day of February, 1920, or at any time subsequent to the 30th day of January, 1920.

### II

The Court erred in admitting evidence over the objection of defendant and in not sustaining defendant's objection to the offer of plaintiff to show and prove as a measure of proper damage the item of the expense for storage of the dehydrated apples, the subject matter of the contract.

### III.

The Court erred in admitting evidence over the objection of defendant, and in not sustaining defendant's objection to the offer of plaintiff of evidence of the sale of some cars of dehydrated apples,

other than the specific car of apples contracted for by and between the plaintiff and the defendant, which specific car of apples was the subject matter of the suit between plaintiff and defendant. [51]

IV.

The Court erred in admitting evidence over the objection of defendant, and in not sustaining defendant's objection to the offer of plaintiff of evidence of the price realized by the plaintiff upon the sale of some cars of apples other than the specific cars of apples contracted for by the plaintiff and defendant, the subject matter of the suit between plaintiff and defendant.

V.

The Court erred in holding and deciding that the measure of damages to be awarded to the plaintiff was the difference between the contract price of the dehydrated apples and the price realized upon the resale thereof and in awarding judgment to plaintiff based upon such difference.

VI.

The Court erred in weighing and considering evidence and making a finding of fact that "on or about January 17, 1920, plaintiff duly tendered to the defendant the delivery of the apples described in the aforesaid contract, and thereupon advised defendant that plaintiff was ready, willing and able to deliver said evaporated apples, in accordance with the terms of said contract, and demanded that defendant forthwith furnish plaintiff with shipping instructions for the shipment of evaporated apples, as provided in said contract."

VII.

The Court erred in weighing and considering evidence and making a finding of fact that "defendant failed and refused to furnish plaintiff with said or any shipping instructions, and on or about January 23, 1920, notified plaintiff that it, the said defendant, would not perform the terms of the aforesaid contract, and has continuously failed and refused to perform the same." [52]

VIII.

The Court erred in weighing and considering evidence and making a finding of fact that "On July 30, 1920, plaintiff sold said evaporated apples which were described in said contract, at a price of eleven and three-fourths (11¾) cents per pound, or a total sum of Seventy Hundred and Fifty ($7050) Dollars. Said sales was made within a reasonable time after the refusal of defendant to accept the delivery of said apples, and with due diligence and in good faith, and as soon as reasonably practicable, by a diligent, competent and prudent salesman, inspired by honesty of purpose and fair consideration for the defendant as well as for the plaintiff."

IX.

The Court erred in weighing and considering evidence and making a finding of fact that "Subsequent to the demand by plaintiff of defendant for the performance of the terms of said contract, and prior to the sale of said evaporated apples by it, plaintiff segregated the apples covered by said con-

tract in a warehouse, and paid storage upon the same in the sum of Three Hundred ($300) Dollars, which expense was necessarily incurred by plaintiff in caring for said apples during said period."

X.

The Court erred in weighing and considering evidence and making a finding of fact that "The aforesaid contract of June 13, 1919, was never rescinded or cancelled by the defendant, and the plaintiff never accepted or consented to such rescission or cancellation, and the obligations on the part of the defendant therein contained never were extinguished."

XI.

The Court erred in not holding and deciding and making a finding of fact that the contract sued upon was cancelled by agreement of the plaintiff and the defendant on or about the 23d day of January, 1920. [53]

XII.

The Court erred in not holding and deciding and making a finding of fact that the contract sued upon was breached by the defendant on January, 1920, and that on said last mentioned date the said breach was accepted and acted upon by the plaintiff.

XIII.

The Court erred in not holding and deciding and making a finding of fact that the market price for dehydrated apples of the kind and quality contracted for on January 23, 1923, and for a reasonable time thereafter f. o. b. Pacific Coast rail ship-

ping point was between seventeen cents and nineteen cents a pound.

XIV.

The Court erred in not holding and deciding and making a finding of fact that there was an active buying market for dehydrated apples of the type, quality and quantity contracted for, during the months of January, February and March, 1920, and that during the said last above mentioned months the market price for said apples at Pacific Coast rail shipping point was as follows:

During January, 1920 ..... 17¢ to 19¢ per lb.
During February, 1920 ..... 16¢ to 18¢ per lb.
During March, 1920 .. ..... 14¢ per pound.

IT IS HEREBY STIPULATED that the above and foregoing may be settled and allowed as and for the bill of exceptions herein and that the same may be signed by the Trial Judge outside of the district without objection; or may be settled and signed by any Judge of this court in San Francisco, California.

HAVEN, ATHEARN, CHANDLER & FARMER,

_____,

Attorneys for Plaintiff.

FRED L. DREHER,

Attorney for Defendant.

Dated: San Francisco, California, July 3, 1923.

[54]

The foregoing bill of exceptions is hereby settled and allowed.

M. T. DOOLING,
Judge.

Dated: July 3, 1923.

[Endorsed]: Filed Jul. 3, 1923. Walter B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [55]

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(Title of Court and Cause.)

**Petition for Allowance of Writ of Error.**

Comes now Garcia & Maggini Co., a corporation, defendant in the above-entitled action, and by its attorney and respectively shows:

That on, to wit, the 27th day of April, 1923, the Court in the above-entitled cause rendered its judgment in favor of the said plaintiff, Washington Dehydrated Food Co., a corporation, and against said defendant, Garcia & Maggini Co., a corporation, on, to wit, the 28th day of April, 1923, final judgment was made and entered in the above-entitled action in favor of the above plaintiff and against the said defendant; your petitioner feeling aggrieved with the said judgment, herewith petitions for an order to allow it to prosecute a writ of error to the United States Circuit Court of Appeals in and for the Ninth Circuit, under the laws of the United States in such cases made and provided;

WHEREFORE, the premises considered, your petitioner prays that a writ of error in its behalf to the United States Circuit Court of Appeals, Ninth Circuit, sitting in the city and county of San Francisco, State of California, in and for said Circuit, for the correction of errors committed by said Court at said trial and said judgment and in entering said judgment, for the reason set forth in petitioner's assignment of errors filed therein, and that a transcript of the record, proceedings and papers upon which said trial was had and judgment was based, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit, and your petitioner will ever pray.

FRED L. DREHER,
Attorney for Petitioner.

[Endorsed]: Filed May 15, 1923. Walter B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [56]

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(Title of Court and Cause.)

**Assignment of Errors.**

Now comes the defendant in the above-entitled cause and files the following assignment of errors upon which it will rely in the prosecution of its writ of error to review a final judgment made and entered against it on the 28th day of April, 1923, in the above-entitled action:

1.

The District Court erred in admitting evidence, over the objection of defendant, and in not sustaining defendant's objection to the offer of plaintiff to show the market condition of dehydrated apples in the northwest and throughout the country on the 13th day of February, 1923, in the following instances:

Q. (By Mr. HAVEN.) What was the condition of the market in the northwest and throughout the country at the time of the date of this letter, February 13, 1920, and also on January 24, 1920, if there was any difference.

Mr. DREHER.—If the Court please, I object to the Question as immaterial, irrelevant and incompetent, and if there is any breach of a contract here the market price as of the date of the breach, the date of delivery, should cover, and not some time subsequent, which is February 13th.

Mr. HAVEN.—January 24th was the date of the first refusal.

The COURT.—It would be the price at or about that time. Of course the real price upon which the damage would be based would be the price that he received, assuming, of course, due diligence and good judgment in the sale. It would not be the exact price on the day of the breach. It depends, of course, upon what you call the day of the breach. He may answer the question; in so far as it is not material or competent, the Court will give it no consideration in making up its decision. For

the record, the objection will be overruled and an exception may be noted.

A. There was no such thing as a market at that time, in the [57] generally accepted use of that term in the trade. The market was dead.

2.

The District Court erred in admitting evidence, over the objection of defendant, and in not sustaining defendant's objection to the offer of plaintiff to show and prove as a measure of proper damage the item of the expense for storage of the dehydrated apples, the subject matter of the contract, in the following instance:

Q. (By Mr. HAVEN.) Do you know whether or not you incurred storage charges: A. We did.

Mr. DREHER.—I object to that as immaterial, irrelevant and incompetent, because that would not be an item of damage.

The COURT.—As the Court stated heretofore, it will be admitted, and if not competent or material it will receive no consideration. The objection is overruled and an exception may be noted. The witness has answered the question.

Mr. DREHER.—At this time, in order to save time, possibly, may it be understood that my objection will run to all these questions with reference to the items of expense incurred by the plaintiff corporation.

3.

The District Court erred in admitting evidence, over the objection of defendant, and in not sustaining defendant's objection to the offer of plaintiff

to show and prove as a measure of proper damage the item of interest charged by plaintiff to defendant, in the following instance:

Q. (By Mr. HAVEN.) In the invoice that you have in your hand, and which is referred to in this letter, you also included an item of interest: How do you compute that?

A. The interest on $11,400 for six months and eighteen days at eight per cent.

Q. That time ran from when?

A. That time ran from the time that the apples were definitely [58] tendered—whatever that letter shows, about the 1st of February, until we received the money for them from Libby, McNeill & Libby, on September 24th.

Q. That is when you received the money from the amount of the sale you made to Libby, McNeill & Libby? A. That is correct.

Q. How much was the interest that you figured in that manner? A. $501.60.

4.

The District Court erred in admitting evidence, over the objection of defendant, and in not sustaining defendant's objection to the offer of plaintiff of evidence of the sale of some cars of dehydrated apples other than the specific car of apples contracted for by the plaintiff and the defendant and the subject matter of the suit between plaintiff and defendant, in the following instance:

Q. (By Mr. HAVEN.) You stated, Doctor, you were endeavoring to sell some cars of apples belonging to your company, as well as these covered by

this contract; when, if at all, did you sell these other cars?

A. The bulk of them were sold almost a year later.

Q. During the intervening time, what, if any, effort did you make to sell those apples?

Mr. DREHER.—That is objected to as immaterial, irrelevant and incompetent, and having no bearing on the issues in this case, and particularly having no bearing on the measure of damages.

The COURT.—What is the purpose of it?

Mr. HAVEN.—The purpose of it is to show good faith in making a sale of the other apples first, and that we made a continuous attempt to sell these apples.

The COURT.—The objection is overruled.

Mr. DREHER.—Exception.

A. We made constant and vigorous efforts to sell them. [59]

5.

The District Court erred in admitting evidence, over the objection of defendant, and in not sustaining defendant's objection to the offer of plaintiff of evidence of the price realized by the plaintiff upon the sale of some cars of apples other than the specific cars of apples contracted for by the plaintiff and defendant, the subject matter of the suit between plaintiff and defendant, in the following instance:

Mr. HAVEN.—Q. And you sold the others just as soon as you could, after having sold the apples under this contract, did you? A. Yes, sir.

Q. At what price did you sell them?

Mr. DREHER.—I object to the question as immaterial, irrelevant and incompetent, and having no bearing on the issue of damages.

The COURT.—I rather think so; still, he has advanced a theory that seems almost impossible on its face, yet I will allow the answer to go in; if not material, the Court will give it no consideration.

A. The Extra Choice grades, which was the same as those tendered, netted us slightly in excess of 5 cents per pound.

6.

The District Court erred in holding and deciding that the measure of damages to be awarded to the plaintiff was the difference between the contract price of the dehydrated apples and the price realized upon the resale thereof and in awarding a judgment based upon such difference.

7.

The District Court erred in weighing and considering evidence and making a finding of fact that "On or about January 17, 1920, plaintiff duly tendered to the defendant the delivery of the apples described in the aforesaid contract, and thereupon advised defendant that plaintiff was ready, willing and able to deliver said evaporated apples, in accordance with the [60] terms of said contract, and demanded that defendant forthwith furnish plaintiff with shipping instructions for the shipment of said evaporated apples, as provided in said contract."

8.

The District Court erred in weighing and considering evidence and making a finding of fact that "Defendant failed and refused to furnish plaintiff with said or any shipping instructions, and on or about January 23, 1920, notified plaintiff that it, the said defendant, would not perform the terms of the aforesaid contract, and has continuously failed and refused to perform the same."

9.

The District Court erred in weighing and considering evidence and making a finding of fact that "On July 30, 1920, plaintiff sold said evaporated apples which were described in said contract, at a price of eleven and three-fourths (11¾) cents per pound, or a total sum of seventy hundred fifty ($7050.00) dollars. Said sale was made within a reasonable time after the refusal of defendant to accept the delivery of said apples, and with due diligence and in good faith, and as soon as reasonably practicable, by a diligent, competent and prudent salesman, inspired by honesty of purpose and fair consideration for the defendant as well as for the plaintiff."

10.

The District Court erred in weighing and considering evidence and making a finding of fact that "Subsequent to the demand by plaintiff of defendant for the performance of the terms of said contract, and prior to the sale of said evaporated apples by it, plaintiff segregated the apples covered by said contract in a warehouse, and paid storage

upon the same in the sum of three *hundred,* which expense was necessarily incurred by plaintiff in caring for said apples during said period."

11.

The District Court erred in weighing and considering evidence and making a finding of fact that "The aforesaid [61] contract of June 13, 1919, was never rescinded or cancelled by the defendant, and the plaintiff never accepted or consented to such rescission or cancellation, and the obligations on the part of the defendant therein contained never were extinguished."

12.

The District Court erred in not holding and deciding and making a finding of fact that the contract sued upon was cancelled by agreement of the plaintiff and the defendant on or about the 23d day of January, 1920.

13.

The District Court erred in not holding and deciding and making a finding of fact that the contract sued upon was breached by the defendant on January 23d, 1920, and that on said last mentioned date the said breach was accepted and acted upon by the plaintiff.

14.

The District Court erred in not holding and deciding and making a finding of fact that the market price for dehydrated apples of the kind and quality contracted for on January 23d, 1923, and for a reasonable time thereafter f. o. b. Pacific Coast Rail Shipping point was between seventeen cents and nineteen cents a pound.

15.

The District Court erred in not holding and deciding and making a finding of fact that there was an active buying market for dehydrated apples of the type, quality and quantity contracted for, during the months of January, February and March, 1920, and that during the said last above-mentioned months the market price for said apples at Pacific Coast Rail Shipping point was as follows:

During January, 1920, seventeen to nineteen cents per pounds:

During February, 1920, sixteen to eighteen cents per pound;

During March, 1920, fourteen cents per pound.

16.

That the judgment of the District Court is not warranted [62] nor supported by the fact, or the law in the premises, but is contrary thereto.

WHEREFORE the appellant prays that the judgment of the United States District Court in and for the Northern District of California, made and entered herein in the office of the Clerk of said Court on the 28th day of April, 1923, be reversed.

Dated: San Francisco, California, this 15th day of May, 1923.

FRED L. DREHER,
Attorney for Defendant and Appellant.

[Endorsed]: Filed May 15, 1923. Walter B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [63]

(Title of Court and Cause.)

**Order Allowing Writ of Error and Fixing Bond.**

Upon reading and filing the petition for writ of error of the said defendant in the above-entitled cause, as likewise the prayer for reversal of the judgment heretofore entered,—

IT IS ORDERED that said writ of error be and it is hereby allowed and the bond is fixed at the sum of Three Hundred ($300.00) Dollars.

Dated: May 15th, 1923.

JOHN S. PARTRIDGE,
Judge.

[Endorsed]: Filed May 15, 1923. Walter B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [64]

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(Title of Court and Cause.)

**Order for Supersedeas Bond.**

IT APPEARING TO THE COURT that the defendant in the above-entitled cause has duly and regularly filed its petition for a writ of error to reverse the judgment of said Court in said action, together with its assignment of errors and a prayer for reversal, and all and singular the premises having been considered,—

IT IS ORDERED that said judgment be, and it is hereby, suspended and superseded upon the execution by said defendant of an undertaking to be approved by me, a Judge of said Court, with two

sufficient sureties, in accordance with Rules 70 and 71 of this Court, in the sum of Six Thousand ($6,000.00) Dollars.

Dated: May 15th, 1923.

JOHN S. PARTRIDGE,
Judge.

[Endorsed]: Filed May 15, 1923. Walter B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [65]

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**(Bond on Writ of Error.)**

KNOW ALL MEN BY THESE PRESENTS, That we, Garcia & Maggini Co., a corporation, as principal and New Amsterdam Causalty Company, a body corporate duly incorporated under the laws of the State of New York, and authorized to act as surety under the act of Congress approved August 13, 1894, whose principal office is located in Baltimore, State of Maryland, as sureties, are held and firmly bound unto Washington Dehydrated Food Co., a corporation, in the full and just sum of Six Thousand and no/100's ($6,000.00) Dollars, to be paid to the said Washington Dehydrated Food Co., a corporation—certain attorney, executors, administrators or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this tenth day of May in the year of our Lord one thousand nine hundred and twenty-three.

WHEREAS, lately at a District Court of the United States for the Northern District of California in a suit depending in said Court, between Washington Dehydrated Food Co., a corporation, plaintiff, and Garcia & Maggini Co., a corporation, defendant, a judgment was rendered against the said Garcia & Maggini Co., a corporation, and the said Garcia & Maggini Co., a corporation, having obtained from said Court a writ of error, allowing an appeal to reverse the judgment in the aforesaid suit, and a citation directed to the said Washington Dehydrated Food Co., a corporation, citing and admonishing it to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at San Francisco, in the State of California.

NOW, THE CONDITION OF THE ABOVE OBLIGATION IS SUCH, That if the said Garcia & Maggini Co., a corporation, shall prosecute to effect, and answer all damages and costs if it fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

Acknowledged before me the day and year first above written. [66]

NEW AMSTERDAM CASUALTY COMPANY.

[Seal] By WALTER W. DERR,

Agent and Attorney in Fact. [Seal]

Form of bond and sufficiency of sureties approved.

JOHN S. PARTRIDGE,

Judge.

[Endorsed]: Filed May 15, 1923. Walter B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [67]

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(Title of Court and Cause.)

**(Bond for Costs.)**

WHEREAS, in an action in the District Court of the United States in and for the Northern District of California, Southern Division, a judgment was on the twenty-eighth day of April, 1923, rendered in favor of the above-named plaintiff and against the above-named defendant in said cause;

AND WHEREAS, the said defendant is dissatisfied with said judgment and is desirous of reversing the same, and to that end has sued out and been allowed a writ of error addressed to said above-entitled court, for the purpose of reviewing and reversing the said judgment,—

NOW, THEREFORE, IN CONSIDERATION OF THE PREMISES and of such writ of error, the undersigned New Amsterdam Casualty Company, a corporation organized and existing under the laws of the State of New York, is held and firmly bound and does hereby undertake in the sum of Three Hundred Dollars ($300.00), and promise on behalf of the defendant in the above-entitled cause that said defendant will pay all damages and costs which may be awarded against it on said writ of error, or the affirmance of said judment, or on a dismissal of said writ of error, not exceeding the aforesaid sum of

Three Hundred Dollars ($300.00), to which amount it acknowledges itself bound.

AND THE SAID SURETY does further agree that in the event of a breach of any condition hereof, and if the said defendant herein shall not successfully prosecute its writ of error, or if the same is dismissed, then the above-entitled court may, upon notice to the said surety, of not less than ten (10) days, proceed summarily in the above-entitled action to ascertain the amount which the said surety is bound to pay on account of said breach, not exceeding the sum of Three Hundred Dollars ($300.00) and render judgment therefor against it, not exceeding [68] the sum of Three Hundred Dollars ($300.00), and award execution therefor.

Dated at San Francisco, California, this sixteenth day of May, A. D. 1923.

NEW AMSTERDAM CASUALTY COMPANY, (Seal)
By WALTER W. DERR,
Agent and Attorney in Fact.

[Endorsed]: Filed May 16, 1923. Walter B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [69]

(Title of Court and Cause.)

**Praecipe for Transcript of Record.**

To the Clerk of Said Court:

Sir: Please prepare record on writ of error and include the following:

1. Judgment-roll.
2. Bill of exceptions.
3. Petition for allowance of writ of error.
4. Assignment of errors.
5. Order allowing writ of error, etc.
6. Appeal bond.
7. Order for supersedeas.
8. Supersedeas bond.
9. Praecipe for record.
10. Original writ of error and citation on writ of error.

FRED L. DREHER,
Attorney for Defendant.

[Endorsed]: Filed Jul. 3, 1923. Walter B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [70]

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(Title of Court and Cause.)

**Certificate of Clerk U. S. District Court to Transcript of Record.**

I, Walter B. Maling, Clerk of the District Court of the United States, for the Northern District of California, do hereby certify the foregoing seventy (70) pages, numbered from 1 to 70, inclusive, to be

full, true and correct copies of the record and proceedings as enumerated in the praecipe for record on writ of error, as the same remain on file and of record in the above-entitled cause, in the office of the Clerk of said Court, and that the same constitute the return to the annexed writ of error.

I further certify that the cost of the foregoing return to writ of error is $33.95; that said amount was paid by the defendant, and that the original writ of error and citation issued in said cause are hereto annexed.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court this 11th day of July, A. D. 1923.

[Seal] WALTER B. MALING,
Clerk United States District Court for the Northern District of California. [71]

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**Writ of Error.**

UNITED STATES OF AMERICA,—ss.

The President of the United States of America, to the Honorable, the Judges of the District Court of the United States for the Northern District of California, GREETING:

BECAUSE, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court, before you, or some of you, between Garcia & Maggini Co., a Corporation, plaintiff in error, and Washington Dehydrated Food Co., a Corporation, defendant in er-

ror, a manifest error hath happened, to the great damage of the said Garcia & Maggini Co., a corporation, plaintiff in error, as by its complaint appears:

We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at the City of San Francisco, in the State of California, within thirty days from the date hereof, in the said Circuit Court of Appeals, to be then and there held, that, the record and proceedings aforesaid being inspected the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

WITNESS, the Honorable WILLIAM HOWARD TAFT, Chief Justice of the United States, the 15th day of May, in the year of our Lord one thousand nine hundred and twenty-three.

[Seal] WALTER B. MALING,
Clerk of the United States District Court for the Northern District of California.

By J. A. Schaertzer,
Deputy Clerk.

Allowed by

JOHN S. PARTRIDGE,
U. S. District Judge. [72]

Due service and receipt of a copy of the within writ of error is hereby admitted this 16th day of May, 1923.

HAVEN, ATHEARN, CHANDLER & FARMER,
Attorneys for Defendant in Error.

**Return to Writ of Error.**

The answer of the Judge of the District Court of the United States, in and for the Northern District of California, Second Division.

The record and all proceedings of the plaint whereof mention is within made, with all things touching the same, we certify under the seal of our said court, to the United States Circuit Court of Appeals for the Ninth Circuit, within mentioned, at the day and place within contained, in a certain schedule to this writ annexed as within we are commanded.

By the Court.

WALTER B. MALING,
Clerk U. S. District Court for the Northern District of California.

[Endorsed]: No. 16,703. United States District Court for the Northern District of California. Garcia & Maggini Co., a Corporation, Plaintiff in Error, vs. Washington Dehydrated Food Co., a Corporation, Defendant in Error. Writ of Error. Filed May 16, 1923. Walter B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk.

**Citation on Writ of Error.**

UNITED STATES OF AMERICA,—ss.

The President of the United States, to Washington Dehydrated Food Co., a Corporation, GREETING:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the city of San Francisco in the State of California, within thirty days from the date hereof, pursuant to a writ of error duly issued and now on file in the Clerk's Office of the United States District Court for the Northern District of California, wherein Garcia & Maggini Co., a corporation, is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable JOHN S. PARTRIDGE, United States District Judge for the Northern District of California, this 15th day of May, A. D. 1923.

JOHN S. PARTRIDGE,
United States District Judge. [73]

Due service and receipt of a copy of the within citation on writ of error is hereby admitted this 16th day of May, 1923.

HAVEN, ATHEARN, CHANDLER & FARMER,
Attorneys for Defendant in Error.

[Endorsed]: No. 16,703. United States District Court for the Northern District of California. Garcia & Maggini Co., Plaintiff in Error, vs. Washington Dehydrated Food Co., a Corp., Defendant in Error. Citation on Writ of Error. Filed May 16, 1923. Walter B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk.

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[Endorsed]: No. 4055. United States Circuit Court of Appeals for the Ninth Circuit. Garcia & Maggini Company, a Corporation, Plaintiff in Error, vs. Washington Dehydrated Food Company, a Corporation, Defendant in Error. Transcript of Record. Upon Writ of Error to the Southern Division of the United States District Court of the Northern District of California, Second Division.

Filed July 11, 1923.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

GARCIA & MAGGINI CO., a Corporation,
Plaintiff in Error,

vs.

WASHINGTON DEHYDRATED FOOD CO., a Corporation,
Defendant in Error.

**Order Extending Time to and Including July 14, 1923, to File Record on Writ of Error and to Docket Cause.**

Good cause being shown, IT IS HEREBY ORDERED that the plaintiff in error in the above-entitled cause may have to and including July 14, 1923, within which to file the record on writ of error and to docket the cause in the United States Circuit Court of Appeals for the Ninth Circuit.

Dated: June 14, 1923.

HUNT,
Judge of the United States Circuit Court of Appeals for the Ninth Circuit.

[Endorsed]: No. 4055. United States Circuit Court of Appeals for the Ninth Circuit. Garcia & Maggini Co., a Corp., Plaintiff in Error, vs. Washington Dehydrated Food Co., a Corporation, Defendant in Error. Order Extending Time to and Including July 14, 1923, to File Record on Writ of Error and to Docket Cause. Filed Jun. 14, 1923. F. D. Monckton, Clerk.

No. 4055

IN THE

# United States Circuit Court of Appeals

For the Ninth Circuit

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GARCIA & MAGGINI CO.
(a corporation),
*Plaintiff in Error,*

vs.

WASHINGTON DEHYDRATED FOOD CO.
(a corporation),
*Defendant in Error.*

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## BRIEF FOR PLAINTIFF IN ERROR.

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FRED L. DREHER,
*Attorney for Plaintiff in Error.*

No. 4055

IN THE

# United States Circuit Court of Appeals

**For the Ninth Circuit**

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GARCIA & MAGGINI CO.
(a corporation),
*Plaintiff in Error,*

vs.

WASHINGTON DEHYDRATED FOOD CO.
(a corporation),
*Defendant in Error.*

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## BRIEF FOR PLAINTIFF IN ERROR.

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This is an appeal of Garcia & Maggini Co. from the judgment of the Southern Division of the United States District Court for the Northern District of California, Second Division, in favor of defendant in error and against plaintiff in error.

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### Statement of the Cases.

The parties to this action entered into a contract in writing on or about the 13th day of June, 1919, in the City and County of San Francisco, State of California, wherein the defendant in error hereinafter called the plaintiff, agreed to sell, and the

plaintiff in error, hereinafter called the defendant, agreed to purchase sixty thousand (60,000) pounds Choice Evaporated Apples at eighteen and one-half (18½¢) cents per pound, f. o. b. Pacific Coast rail shipping point. Payment was to be made against draft, with documents attached, in New York, Chicago or San Francisco Exchange, or equivalent. The contract further provided that the plaintiff was privileged to substitute grades, providing the plaintiff "cannot fill order with grade ordered at Extra Choice 19¢, Fancy 19¾¢".

The plaintiff alleged that on or about January 17, 1920, it advised the defendant that it was ready to deliver said evaporated apples in accordance with the terms of said contract and demanded that defendant forthwith furnish shipping instructions, but that the defendant failed and refused to furnish said or any shipping instructions and on or about January 23, 1920, notified plaintiff that it would not perform the terms of the contract. Plaintiff further alleged that defendant at all times mentioned failed and refused to perform the terms and conditions of said contract on its part to be kept and performed; that on or about February 13, 1920, plaintiff notified defendant that it would sell said evaporated apples and would hold the defendant for any loss suffered thereby; that plaintiff "within a reasonable time, after the aforesaid notice, sold said evaporated apples for the sum of $7050.00"; that it further paid for storage and insurance on said evaporated apples the sum of $426.44.

In its second cause of action the plaintiff, after setting forth the execution of said contract, and the terms and conditions thereof as set forth in the first count, alleged that on or about the 17th day of January, 1920, it advised the defendant that it was ready to deliver said evaporated apples and demanded shipping instructions thereon; that said defendant failed and refused to furnish it with any shipping instructions and on or about January 23, 1920, notified said plaintiff that it, the said defendant would not perform the terms of the said contract. The second count further alleges that

> "the value of the aforesaid quantity and quality of evaporated apples to plaintiff at Wenatchee in the State of Washington on or about January 17, 1920, was the sum of $2400.00".

The defendant denied that plaintiff on or about June 13, 1919, entered into a contract in writing wherein and whereby it agreed to buy from plaintiff 60,000 pounds or any other quantity of Extra Choice Evaporated Apples at an agreed price or for any other sum, except as set forth in the certain written contract, a copy of which was attached to the answer of defendant; denied that in accordance with the contract set forth and alleged by plaintiff, or in accordance with the contract attached to the answer of defendant the plaintiff was ready, willing or able on or about January 17, 1920, or at any other time, to deliver to said defendant the evaporated apples contracted for, and further denied upon information and belief that the plaintiff within a reasonable

time after the 13th day of February, 1920, sold said evaporated apples for the sum of seven thousand and fifty ($7050.00) dollars;

Defendant answering the second count set forth in the complaint of plaintiff denied that it contracted in writing to purchase from plaintiff 60,000 or any other number of pounds of extra choice evaporated apples at an agreed price, save and except as set forth in the written contract, a copy of which was attached to the answer of said plaintiff in error; denied that on or about January 17, 1920, or at any other time, plaintiff advised the defendant that it was ready, willing, and able to deliver said evaporated apples in accordance with the terms and conditions of the contract entered into by and between the said parties, a copy of which was attached to the answer of said defendant; defendant further denied upon information and belief that the value of the quantity or quality of evaporated apples to plaintiff at Wenatchee in the State of Washington on or about January 17, 1920, or within any reasonable time thereafter, was the sum of twenty-four hundred dollars, or any sum less than the sum of eleven thousand four hundred dollars, and alleged that the value of said evaporated apples to the plaintiff at the point of shipment, provided in said contract on or about January 17, 1920, and for a reasonable time thereafter, was not less than the sum of eleven thousand four hundred dollars.

By way of special defense, defendant alleged that on or about the 13th day of June, 1919, the parties entered into a contract in writing, copy of which was attached to the answer of said defendant; that said contract was the only contract entered into by the parties, whereby defendant purchased from plaintiff any evaporated apples; that on or about the 23rd day of January, 1920, said contract was rescinded and cancelled by the mutual agreement of plaintiff and defendant; that thereupon all obligations on the part of both parties thereto were extinguished.

Upon the trial of the issues involved in the Court below, judgment was rendered in favor of the plaintiff and against the defendant in the sum of $5522.86.

The following errors are specifically asserted and urged by the defendant:

1.

The District Court erred in admitting evidence, over the objection of defendant, and in not sustaining defendant's objection to the offer of plaintiff to show the market condition of dehydrated apples in the northwest and throughout the country on the 13th day of February, 1923, in the following instances:

> Q. (By Mr. Haven). What was the condition of the market in the northwest and throughout the country at the time of the date of this letter, February 13, 1920, and also on January 24, 1920, if there was any difference.

Mr. Dreher. If the Court please, I object to the question as immaterial, irrelevant and incompetent, and if there is any breach of a contract here the market price as of the date of the breach, the date of delivery, should cover, and not some time subsequent, which is February 13th.

Mr. Haven. January 24th was the date of the first refusal.

The Court. It would be the price at or about that time. Of course the real price upon which the damage would be based would be the price that he received, assuming, of course, due diligence and good judgment in the sale. It would not be the exact price on the day of the breach. It depends, of course, upon what you call the day of the breach. He may answer the question; in so far as it is not material or competent, the Court will give it no consideration in making up its decision. For the record, the objection will be overruled and an exception may be noted.

A. There was no such thing as a market at that time, in the generally accepted use of that term in the trade. The market was dead.

4.

The District Court erred in admitting evidence, over the objection of defendant, and in not sustaining defendant's objection to the offer of plaintiff of evidence of the sale of some cars of dehydrated apples other than the specific car of apples contracted for by the plaintiff and the defendant and the subject matter of the suit between plaintiff and defendant, in the following instance:

Q. (By Mr. Haven). You stated, Doctor, you were endeavoring to sell some cars of apples

belonging to your company, as well as these covered by this contract; when, if at all, did you sell these other cars?

A. The bulk of them were sold almost a year later.

Q. During the intervening time, what, if any, effort did you make to sell those apples?

Mr. DREHER. That is objected to as immaterial, irrelevant and incompetent, and having no bearing on the issues in this case, and particularly having no bearing on the measure of damages.

The COURT. What is the purpose of it?

Mr. HAVEN. The purpose of it is to show good faith in making a sale of the other apples first, and that we made a continuous attempt to sell these apples.

The COURT. The objection is overruled.

Mr. DREHER. Exception.

A. We made constant and vigorous efforts to sell them.

6.

The District Court erred in holding and deciding that the measure of damages to be awarded to the plaintiff was the difference between the contract price of the dehydrated apples and the price realized upon the resale thereof and in awarding a judgment based upon such difference.

9.

The District Court erred in weighing and considering evidence and making a finding of fact that "on July 30, 1920, plaintiff sold said evaporated apples which were described in said contract, at a price of eleven and three fourths (11¾) cents per

pound, or a total sum of seventy hundred fifty ($7050.00) dollars. Said sale was made within a reasonable time after the refusal of defendant to accept the delivery of said apples, and with due diligence and in good faith, and as soon as reasonably practicable, by a diligent, competent and prudent salesman, inspired by honesty of purpose and fair consideration for the defendant as well as for the plaintiff.

11.

The District Court erred in weighing and considering evidence and making a finding of fact that

> "The aforesaid contract of June 13, 1919, was never rescinded or cancelled by the defendant, and the plaintiff never accepted or consented to such rescission or cancellation, and the obligations on the part of the defendant therein contained never were extinguished."

13.

The District Court erred in not holding and deciding and making a finding of fact that the contract sued upon was breached by the defendant on January 23, 1920, and that on said last mentioned date the said breach was accepted and acted upon by the plaintiff.

14.

The District Court erred in not holding and deciding and making a finding of fact that the market price for dehydrated apples of the kind and quality contracted for on January 23, 1923, and for a rea-

sonable time thereafter f. o. b. Pacific Coast Rail Shipping point was between seventeen cents and nineteen cents a pound.

15.

The District Court erred in not holding and deciding and making a finding of fact that there was an active buying market for dehydrated apples of the type, quality and quantity contracted for, during the months of January, February and March, 1920, and that during the said last above-mentioned months the market price for said apples at Pacific Coast Rail Shipping point was as follows:

During January, 1920, seventeen to nineteen cents per pound;

During February, 1920, sixteen to eighteen cents per pound.

During March, 1920, fourteen cents per pound.

16.

That the judgment of the District Court is not warranted nor supported by the fact, or the law in the premises, but is contrary thereto.

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**Issue.**

This appeal presents for adjudication the following points:

1. Was the contract cancelled by the mutual consent and agreement of the parties thereto?

2. If the contract was not cancelled, was there a breach thereof committed by the defendant on January 23, 1920, which breach was accepted and acted upon by the plaintiff on or about January 24, 1920.

3. What is the proper measure of damages, if any, to be awarded to the plaintiff?

4. Did the plaintiff offer to deliver or sell for the account of the defendant the grade and quality of evaporated apples contracted for by defendant.

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## Points and Authorities.

**THE CONTRACT SUED UPON WAS CANCELLED BY THE MUTUAL CONSENT OF THE PARTIES THERETO ON OR ABOUT THE 24TH DAY OF JANUARY, 1920, AND ALL RIGHTS AND OBLIGATIONS OF THE CONTRACTING PARTIES WERE EXTINGUISHED.**

After the parties to the contract had entered into the same in the month of June, 1919, the defendant wired the plaintiff on January 23, 1920, as follows:

> "Referring your letter 20th and wire 23rd, you are tendering us choice Wenatchee stock, whereas you sold us car choice Yakima from your Yakima evaporator stop therefore cannot accept." (Trans. p. 37, Plaintiff's Exhibit No. 7.)

In reply thereto, plaintiff on January 24, 1920, wired as follows:

> "We understand your wire 23rd cancels order for car apples is this correct Wire" (Trans. p. 55 Defendant's Exhibit "A".)

Defendant replied on the same day as follows:

> "Replying your wire even date your understanding correct as tender made by you cancels contract dated June thirteenth nineteen nineteen" (Trans. p. 55. Defendant's Exhibit "B".)

We contend that the contract sued upon in this action was cancelled by the agreement of the parties. It must be borne in mind that on the 23rd and 24th days of January, 1920, the market for dehydrated apples was strong, even though the month of January in any year is not the best of month for the evaporated apple trade. The defendant relied upon the cancellation and took no steps to protect itself.

In *Schwab Safe & Lock Co. v. Snow* (Utah), 152 Pac. 171, the defendant placed an order with the plaintiff for a safe, which order was accepted. Subsequently the buyer wrote to the seller

> "We feel very much grieved in having to request you to cancel the order of W. H. Bishop for a No. 160 which you have since Nov. 1906."

To this the seller replied:

> "We are also grieved that it is necessary to cancel the Bishop No. 160 safe, but it was impossible for us to fill the order any sooner."

This was held to amount to a cancellation.

In

*Mowry v. Kirk,* 19 Ohio St. 375,

the defendant negotiated with plaintiff to sell the latter railroad bonds for $44,000.00, the bonds to be

delivered the next day. On the day appointed the plaintiff called for the bonds, but the defendant refused to let him have the same with the exception of $1000.00 worth. The plaintiff made no tender of the purchase price until a week had passed, when he then called and offered payment. The Court held that the delinquency of the plaintiff in failing to make tender until one week after the proposed date of sale, gave rise to the conclusive presumption that he assented to the rescission and authorized defendant to act on that presumption.

In

*Sidney Glass Works v. Barnes,* 86 Hun. 374; 33 N. Y. Supp. 508,

the defendant, after ordering stock from the plaintiff became dissatisfied with the tardiness of the shipments and wrote to plaintiff countermanding the order, but instructing plaintiff to ship what stock was on hand. This, the plaintiff did and it was held that the contract was rescinded and cancelled by mutual consent.

> "If either party without right claims to rescind, the contract, the other party need not object, and if he permit it to be rescinded, it will be done by mutual consent; nor need this purpose of rescinding be expressly declared by the one party in order to give the other the right of consenting and so rescinding. There may be many acts from which the opposite party has a right to infer that the party doing them would rescind."
>
> 2 *Parsons on Contracts*, 7th Edition 812.

Where a party, even without right, claims to rescind a contract, if the other party agrees to the rescission, or does not object thereto, and permits it to be rescinded, the rescission is by mutual consent.

*Ralya v. Atkins,* 157 Ind. 331; 61 N. E. 726.

"Cancellation is a matter and a question of intention."

*Turner v. Markham,* 155 Cal. 573.

"Rescission by mutual consent is possible even where there is a dispute."

*Skillman Hdwe. Co. v. Davis,* 53 N. J. L. 144; 20 A. T. L. 1080.

See also

*Denio v. Hersh,* 158 Wis. 502; 149 N. W. 145;

*Simpson v. Emmons,* 99 A. T. L. 658;

*N. Y. Brokerage Co. v. Wharton,* 143 Iowa 61; 119 N. W. 969;

*Williston on Contracts,* Sec. 1467, p. 2615.

"It is competent for parties to mutually annul or rescind a contract and the rescission can be inferred from the acts of the parties."

24 R. C. L. 272.

See also

*Florence Minn. Co. v. Brown,* 124 U. S. 385;

31 *U. S. Law Edition* 424;

*Green v. Wells,* 2 Cal. 584;

*Murray v. Harway,* 56 N. Y. 337.

"The term cancellation of a contract necessarily implies a waiver of all rights thereunder by the parties."

6 R. C. L. 943.

"Where a contract has been rescinded by mutual consent, the parties are, as a general rule, restored to their original rights with relation to the subject matter and no action for breach can be maintained thereafter."

13 C. J. 602;

*Hoyt v. Bental,* 126 Pac. 370.

"The doctrine of these authorities is that the refusal of one party to perform his contract amounts on his part to an abandonment of it. The other party thereupon has a choice of remedies. He may stand upon his contract, refusing assent to his adversary to rescind it and sue for a breach, or, in a proper case, for specific performance; or he may assent to its abandonment and so effect a dissolution of the contract by the mutual and concurring assent of both parties. In that event he is simply restored to his original position and can neither sue for a breach nor compel a specific performance, because the contract itself has been dissolved."

*Graves v. White,* 87 N. Y. 463, 465.

See also

*Lawrence v. Taylor,* 5 Hill (N. Y.) 107;

*Hayes v. Stortz,* 131 Mich. 63; 90 N. W. 678;

*Drew v. Claggett,* 39 N. H. 431.

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**THE PLAINTIFF USED THE WORD "CANCEL" IN ITS TECHNICAL SENSE AND IS BOUND BY THE USE THEREOF.**

In business transactions words taken both in their ordinary significance and according to custom and usage have a particular and well defined meaning. Whenever parties are desirous of ending for all

purposes the contract entered into they make use of the word "cancel" in order to signify that they each desire that the contract be ended without the reservation in either party of any rights which would legally accrue to them or either of them by reason of their entrance into the contract. The word "cancel" is entirely different from the word "rescission" as used in ordinary parlance and has a particular and significant meaning attached to it. It has also a technical one well understood in business and in legal circles. Such meaning is particularly patent and obvious to those engaged in the import and export business, to those engaged in handling perishable commodities and requires no explanation. Where it is desired to completely dissolve and destroy a contract the word "cancel" or "cancellation" is always used.

In the case at bar the plaintiff made use of that word for a definite purpose. It was desired that the contract entered into by the parties be annulled, cancelled and destroyed and it was the intention of the parties in so using the word to effect a total dissolution of their covenants and agreements. To give effect to such intention becomes the duty of the Court. It is to be remembered that at the time the correspondence passed between the plaintiff and defendant on or about January 23, 1920, as the same bears reference to the cancellation of the contract, the market for dehydrated apples was regular and sales were had at that time and for a considerable length of time thereafter at usual high prices. We

have in mind the fact that ofttimes contracts are rescinded by a breach thereof or by the agreement of the parties—rescission that leaves, however in the non-defaulting party the right to sue for any damages suffered as a result of such breach. In such case it is clearly the law that the non-defaulting party has his choice of remedies, on any of which he may elect to proceed and in such cases and under such circumstances a technical rescission of the contract is allowed for the purpose of enabling the non-defaulting party to proceed to indemnify himself for any damages suffered by reason of the breach or agreed rescission. He, however, proceeds *on his contract* and whilst the contract is rescinded for all purposes it is not dissolved or annulled or cancelled to that extent that no suit may be brought thereon for a breach thereof.

In the case at bar, however, no such law confronts this Honorable Court. Here there is no question of rescission, only the question of cancellation. We contend that the parties to this contract effected a cancellation—a total dissolution of the contract. This is based both upon their use of technical words and the fact that dehydrated apples were enjoying a strong, ready and active selling market. Their intention to dissolve and annul the contract is manifest from their actions and the correspondence passing between them. That it may not be inferred that a cancellation of this contract was desirable only to the defendant because of a falling market it need only be shown that sales of the commodity

ordered were regular in the months immediately preceding and following the 23rd day of January, 1920. Supportive of this we deem it advisable to quote from the testimony offered on behalf of the defendant, testimony offered by disinterested witnesses:

> "Mr. Oppenheimer. On January 8, 1920, we sold twelve hundred boxes of evaporated apples at eighteen cents a pound. On February 17, 1920, seventy six thousand pounds were sold at 15½¢ per pound. (Trans. p. 62.)
>
> Mr. Dreher. I offer in evidence, if the Court please, the issue of the California Fruit News, as of January 31, 1920, showing the quotations on evaporated apples: Choice in 50 pounds at 17½ cents; extra choice, 50 pound boxes, 18¼; fancy, 50 pound boxes, 20 cents. (Trans. pp. 63-64.)
>
> Mr. Dreher. .We offer in evidence the issue of the paper (February 7, 1920) showing choice apples in 50 pound boxes, 17¼ cents; extra choice, 50 pounds, 18 cents; fancy, 20 cents; f. o. b. California shipping points. (Trans. p. 64.)
>
> Mr. Dreher. The next issue is the 14th of February; the price for choice, 50 pound boxes, 17; extra choice 17½; fancy 20. For February, 1921, the price of choice is 16 to 16½; extra choice 16½ to 17; fancy, 18½ to 19." (Trans. p. 65.)

There is further the testimony of Mr. Arthur C. Oppenheimer who testified that he had been engaged in handling dried fruits for twenty-six years and was familiar with the market conditions prevailing during the years 1920 and 1921. (Trans. pp. 61-62.)

It can therefore hardly be contended with any degree of conviction that the defendant desired to escape from the contract because of a falling market. To the contrary we reiterate that the market was regular and strong, that sales were being made and that the cancelling of the contract was first broached by the plaintiff.

On February 2, 1920, the defendant wrote to the plaintiff calling attention to the agreed cancellation showing that the intention to cancel was in the minds of the parties, (Trans. pp. 56-57. Defendant's Exhibit "C") and it is to be here observed that it was not until February 13, 1920, that the plaintiff attempted to escape from the agreed cancellation—eleven days after its receipt of the confirmation of cancellation. (Trans. 41. Plaintiffs' Exhibit 11.) From the 24th day of January, 1920, to the receipt of the last mentioned letter the defendant had relied on the agreed cancellation and necessarily took no steps to protect itself. What actuated the plaintiff in writing the letter of February 13, 1920, is not shown but it can be justly and correctly surmised that one of the motives underlying the dictation of the said letter was the information received from an unknown source by the plaintiff that the U. S. Government was bringing back to the United States from Europe evaporated apples and fruits and throwing them on the market in large quantities, "for anything that was offered for them". (Trans. p. 43.) Aside from the indictment of the U. S. Government for the poor business methods indulged

in by it, in so offering for sale "evaporated apples" and "fruits" upon the unsupported testimony of the manager of the plaintiff there is to be found in such testimony the reason for the letter of the plaintiff dated February 13, 1920, when for the first time the agreed cancellation of the contract was denied. Regardless of what intendment the author of the telegram of January 24, 1920, placed upon his words contained therein the fact is that he led the defendant to place reliance upon the cancellation—to consider the contract annulled and dissolved, and he may not at this late date be heard to say that a cancellation was never consummated or intended.

No rule is better settled than that technical words are presumed to have been used technically unless the contrary appears on the face of the instrument.

*King v. Johnson,* 117 Va. 52; 83 S. E. 1070;

*Hickel v. Starcher,* 90 W. Va. 369; 110 S. E. 695;

*Robertson v. Wampler,* 104 Va. 380; 51 S. E. 835.

In the construction of contracts it is a general rule that technical words are to be taken according to their approved and known use in the trade in which the contract is entered into or to which it relates.

3, *Starkie Evidence,* 1036.

Words are not to be interpreted by any theory of how they ought to be used but in accordance with

the actual use to which they are put by those for whom custom establishes a standard.

*Continental Casualty v. Johnson,* 74 Kans. 129; 85 Pac. 545.

Words must be understood in the sense in which they are commonly used in the business to which the contract in which they are found relates.

*Graybull v. Penn Twp. Mut. F. Ins. Ass'n.,* 170 Pac. 75.

See also

*Metropolitan Exhibition Co. v. Ewing,* 42 Fed. 198.

Technical words will be taken in a technical sense.

13 C. J. 532. Note 490.

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CANCEL MEANS TO ANNUL AND DISSOLVE.

"One meaning of cancel is to annul. Taking it to have that meaning here there is nothing in the expression of the arbitrators inconsistent with this supposition, that they meant the equitable set offs to be the means or causes by which the mortgage and note were to be null and void, cancelled, annulled. And if they meant this they did not go beyond the submission."

*Golden v. Fowler,* 26 Ga. 451-464.

Webster defines cancel as follows:

"To annul or destroy" and gives the following synonyms: "Blot out, obliterate, efface, expunge, annul, abolish".

The same definition is given of cancel in the Standard dictionary.

For a definition of the word "cancel" or "cancellation," see the following cases:

*Babbit v. Fidelity Trust Co.,* 72 N. J. Eq., 745.

*Brown v. Gibson's Ex.,* 107 Va. 383; 59 S. E. 384;

*City of St. Louis v. Kellman,* 139 S. W. 443; 235 Mo. 687;

*Wilson v. People,* 36 Colo. 418; 85 Pac. 187;

*Whedon v. Lancaster County,* 80 Neb. 682; 114 N. W. 1102.

After a contract is discharged by recission or substitution of a new contract no action can be maintained on the original contract.

*Lipschultz v. Weatherly & Twiddy,* 140 N. C. 365; 53 S. E. 132.

Citing

*Dreifus v. Columbian Exposition Co.,* 194 Pa. 475; 75 A. S. R. 704.

In *People v. Hollett,* 1 Colo. 352, the Court, at page 359 quotes with approval the following language from *People v. Hughes,* et al., 3 Mich. 598:

> "The natural import of words is that which their utterance promptly and uniformly suggests to the mind, that which common use has affixed to them; the technical is that which is suggested by their use in reference to a science or profession, that which popular use has fixed to them and when the natural and technical import unite upon a word both their rules

> combine to control its construction, and, indeed it is difficult to understand how any other signification than that which they suggest can be affixed to it unless upon the most positive declaration that a different one was designed."

Taking therefore into consideration the stability of the market for the commodity originally contracted for by the parties to this litigation and taking into consideration the intention of the parties to cancel the contract as manifested by their use of the very language from which a cancellation and abolishment only can be imported, we submit that the contract was cancelled, abolished and destroyed without the reservation of rights in any of the parties thereto and that the cancellation leaves them in the position as if no contract had ever been entered into. If the plaintiff did not desire a cancellation there are numerous words which it could have used in order that an intention of cancellation be not manifested on its part. To the same extent it is true that the defendant likewise if it did not desire a cancellation could have used some other word but taking the action of both parties, their intention and the use of the word "cancel" we are convinced that a cancellation of the contract was effected.

## Measure of Damages.

**WHAT IS THE PROPER MEASURE OF DAMAGES, IF ANY, TO BE AWARDED TO THE PLAINTIFF?**

In addition to our contention set forth hereinabove that the contract sued upon in this case was cancelled by the mutual agreement of the parties, and which contention we maintain, if allowed, is the correct solution of the problem that confronts this Honorable Court, we maintain further that the Court below erred in allowing the measure of damages prayed for, to-wit, the difference between the contract price of the commodity ordered and the price realized upon the resale had without notice to the defendant, five months after the time agreed upon in the contract for delivery. If we forego for the purpose of discussing this contention our claim that the contract was cancelled we maintain that the true measure of damages, if any, to be awarded to the plaintiff was either of one of two measures.

(1) If the contract sued upon was not cancelled by the mutual agreement of the parties thereto, then it was breached by the defendant on the 23rd day of January, 1920, which breach was accepted and acted upon by the plaintiff on January 24, 1920, and the only measure of damages to be awarded to the plaintiff was that based upon the difference between the contract price and the market price on the date of the acceptance of the breach; or

(2) If no cancellation took place—and if the breach was not accepted on January 24, 1920, then an anticipatory breach of the contract took place on January 23, 1920, which was not accepted nor acted upon by the plaintiff, the contract was kept alive for the benefit of both parties until the 31st day of January, 1920, the date agreed upon for delivery, and the measure of damages to be awarded to the plaintiff is the difference between the contract price and the market price at the date and place of delivery agreed upon or within a reasonable time thereafter.

It is the well settled law in the United States and particularly the law of the States of California and Washington that upon an anticipatory breach of an executory contract of sale the nondefaulting party can treat the breach as a termination of the contract, at which time his cause of action will arise and fix his measure of damages. On the other hand he may refuse to acquiesce in the attempted termination of the contract arising out of the anticipatory breach, and keep the contract alive for the benefit of both parties until the date of performance; in this case January 31, 1920. Either the anticipatory breach is accepted and acted upon by the non-defaulting party or it is not. If it is, the measure of damages is fixed as of the date of the breach and acceptance thereof. If it is not and the contract is kept alive until the date of performance arrives, then the measure of damages is the difference between the contract and

the market price at the time and place of delivery or within a reasonable time thereafter but the non-defaulting party *must* elect whether he will treat the contract as ended or as still existing and from his actions the election may be derived. The doctrine is well settled in England and is adopted by the great majority of the American Courts and text books.

In the case of *Roehm v. Horst*, 179 U. S. 1, it was held that the seller may accept the repudiation of the sale on the date on which it was made and act on the repudiation and breach but he does not have to. This decision was quoted with approval in the case of *Marx v. Van Eighan*, 85 Fed. 853, wherein it was said:

> "In view of the overwhelming preponderance of adjudication, we think it must be accepted as settled law that where one party to an executory contract renounces it without cause before the time for performing it has elapsed, he authorizes the other party to treat it as terminated without prejudice to a right of action for damages; and if the latter elects to treat the contract as terminated his right of action accrues at once. The latter, however, must elect whether he will treat the contract as terminated or as still existing."

The doctrine of these authorities is adopted and approved without exception as far as we have been able to ascertain by the federal decisions and by

the great number of decisions by the state Courts where the question has been raised.

*Brewing Co. v. Bullock,* 8 C. C. A. 14; 58 Fed. 83;

*Howard v. Daly,* 61 N. Y. 362;

*Feris v. Spooner,* 102 N. Y. 10; 5 N. E. 773;

*Windmuller v. Pope,* 107 N. Y. 675; 14 N. E. 436;

*Nickols v. Steel Co.,* 137 N. Y. 471; 33 N. E. 561;

*Fox v. Kitton,* 19 Ill. 519;

*Engesette v. McGilvary,* 63 Ill. App. 461;

*Railway Co. v. Richards,* 152 Ill. 59; 38 N. E. 773;

*Crabtree v. Messersmith,* 19 Iowa 179;

*Holloway v. Griffith,* 32 Iowa 409;

*McCormick v. Basal,* 46 Iowa 235;

*Platt v. Brand,* 26 Mich. 173;

*Sloss Co. v. Smith,* 11 Ohio 312;

*Kalkgoff v. Nelson,* 60 Minn. 284-287, 62 N. W. 332;

*Davis v. Furniture Co.,* 41 W. Va. 717; 24 S. W. 630.

We contend that the plaintiff by its actions as manifested in its correspondence with the defendant elected to accept the anticipatory breach of the contract as of the 24th day of January, 1920, at which time, under the foregoing decisions, his cause of action arose and was perfected. On such date, to-wit, the 24th day of January, 1920, the market

price for dehydrated apples of the quality and kind contracted for f. o. b. Pacific Coast rail shipping point was between 17-½¢ and 20¢ per pound. (Trans. pp. 62, 63 and 64.)

The contract price of the commodity sold was $11,400 and taking the mean market price between 17½¢ and 20¢ or 18¾¢, the correct market price of the rejected dehydrated apples on January 24, 1920, and for a reasonable time thereafter, was the sum of $11,250.00. The correct measure of damage therefore based upon the difference between the contract price and the market price on the date of the acceptance of the breach and for a reasonable time thereafter was the sum of $150.00.

As we have heretofore stated if we forego the theory of cancellation it must be admitted that there was an anticipatory breach of the contract which breach was accepted by the plaintiff on the 24th day of January, 1920. The damages are necessarily fixed as of that date and for a reasonable time thereafter based as they are upon the then prevailing market price for dehydrated apples. The only evidence offered as to the market price prevailing on January 24, 1920, and for a reasonable time thereafter was offered by the witnesses for the defendant, except the general announcement by the manager of the plaintiff that "there was no such thing as a market at that time in the generally accepted use of that term in the trade. The market was dead." (Trans. p. 43.) We do not wish to be understood as con-

tending that it is imperative that the non-defaulting party accept the breach as of the date thereof, because such is not the law. We do contend, however, that it is the privilege of the non-defaulting party to elect to accept the breach as of the date thereof. In fact under the ruling in *Marx v. Van Eighen,* (supra), the privilege of election, as to whether the breach will be accepted as of the date thereof or whether the contract will be kept alive until the date of performance rests solely with the non-defaulting buyer—*but the election must be made.* We submit that under the law of the correspondence and the facts of this case the election to rescind and to accept the breach as of the date thereof was made by the plaintiff on the 24th day of January, 1920, and the measure of damages is fixed as of that date or within a reasonable time thereafter.

As was well said in the case of

*Masterton v. Mayor of Brooklyn,* 7 Hill 61; 42 A. D. 38,

> "Where the contract is broken before arrival of the time for full performance and the opposite party elects to consider it in that light the market price on the day of the breach is to govern in the assessment of damages. In other words, the damages are to be settled and ascertained according to the existing state of the market at the time the cause of action arose and not at the time fixed for full performance. The basis upon which to estimate the damages, therefore, is just as fixed and ascertained in cases like the present as in actions predicated upon a failure to perform at the day.

Turning to the third contention raised by the defendant, to-wit, that the correct measure of damages disallowing a cancellation or a measure of damages based upon the difference between the contract price and the market price at the date of the breach and acceptance thereof, the true and the only measure of damage to be awarded the plaintiff under the facts and circumstances of this case is one based upon the difference between the contract price and the market price at the date and place of delivery, or within a reasonable time thereafter.

The contract herein was entered into at the City and County of San Francisco, State of California, and was to be performed in the State of Washington. Suit was filed for the breach of the contract in the State of California. The remedy therefor, if any, must be based upon the law of the forum—the law of the State of California.

In *Scudder v. Union National Bank,* 91 U. S. 406, the Supreme Court of the United States says:

> "Matters bearing upon the execution, the interpretation and the validity of a contract are determined by the law of the place where the contract is made. Matters connected with its performance are regulated by the law prevailing at the place of performance. Matters respecting the remedy such as the bringing of suits, admissibility of evidence, statutes of limitations, depend upon the law of the place where the suit is brought."

In *U. S. Bank v. Donnelly,* 8 Pet. 361, 8 Law Ed. 974, an action was brought in Virginia on notes

executed and made payable in Kentucky. It was held that the plea of the statute of limitations of Virginia was a bar to the action.

The law of the forum governs the remedies.

9 Cyc. 684, and cases cited.

Upon the anticipatory breach of an executory contract of sale where the breach is not accepted on the date thereof but the contract is kept alive for the benefit of both parties, the measure of damages is the difference between the contract price and the market price of the rejected commodity at the time and place of delivery or within a reasonable time thereafter. This law governing the measure of damages is particularly true of the law of the State of California, the law of the forum that must govern the remedy, if any, possessed by the plaintiff.

> "The general rule is that the measure of damages for the breach of a contract for the sale of a commodity where the vendee refuses to accept delivery, is the difference between the contract price and the market value at the time and place of delivery."
>
> *Hughes v. Eastern Ry. & Lumber Co.,* 93 Wash. 558; 161 Pac. 343, citing numerous cases.

See also,

*Carver-Shadbolt Co. v. Klein,* 69 Wash. 586, 125 Pac. 944;

35 Cyc. 592, and citations.

Where there is an exact time fixed for delivery the damages where buyer refuses to accept delivery

and repudiates the contract is the difference between the contract price and the market price at the date of demand and refusal.

*Jones-Scott Co. v. Ellensburg Milling Co.,* 116 Wash. 266; 199 Pac. 238.

It is no doubt the approved law of the land, that where one party to an executory contract repudiates it or announces his unequivocal intention to not perform, the party not in default can ignore and refuse to accept the breach or abandonment and keep the contract alive until the date of performance in which case his damages will be the difference between the contract price and the market price at the date and place of performance,

As was well said in

*Dill v. Memford, et al.* (Ind.), 49 N. E. 861,

> "If it is found that the contract is executory and no title has passed, the seller would have his action for damages, and the measure of damages would be the difference between the contract price and the market price at the time and place when and where under the contract he should have accepted."

> "For the refusal to accept the goods purchased by an executory contract the measure of damages is the difference between the contract price and the market price at the time and place of delivery. If there is no market for articles of the character sold at that time at the place for delivery then the measure of damages is the difference between the contract

price and the market value in the nearest available market less the cost of transportation."

*Lawrence Canning Co. v. H. D. Lee Mercantile Co.,* 5 Kan. App. 77; 48 Pac. 749.

See also,

*Gibbs v. Dare,* 103 Cal. 454;
*Mechem's Cases on Damages,* 265;
*U. S. v. Smoots,* 21 Law Ed. 107;
*Phillpotts v. Evans,* 5 Mess. & W. 475.

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**THE MEASURE OF DAMAGES TO BE AWARDED TO THE PLAINTIFF, IF ANY, IS BASED UPON THE LAW OF CALIFORNIA, WHICH IS LIKEWISE THE GENERAL LAW OF THE MAJORITY OF THE STATES.**

The resale had by the plaintiff does not under the facts of this case warrant an award of damages based upon the difference between the contract price and the price realized upon the resale.

We contend that the Court below committed error in granting a judgment based upon the difference between the contract price and the price realized upon the resale. Our contention is based upon the fact that the plaintiff in this action, under the law of the State of California which governs the remedy of the plaintiff and also under the law of the State of Washington, the place where the contract was to be performed, did not effect a resale in the manner required by law in order that it might be granted as damages the difference between the contract price and the price realized upon the resale.

If the plaintiff did not so hold the resale, then it is relegated to a measure of damages based upon the difference between the contract price and the market price at the time and place of delivery or within a reasonable time thereafter.

In the first place the resale was not made within a reasonable time after the date of performance.

> "The seller is not bound to sell at the contract place of delivery or immediately but it is generally his duty to resell within a reasonable time and if he does not the original buyer is not responsible for the delay."
>
> 35 Cyc. 524.

We submit that a period of five months is not a reasonable time for a resale under the facts and circumstances of this case, particularly in view of the testimony of the disinterested witnesses to the effect that sales were made of similar dehydrated apples in January, February and March, of 1920, and for prices far in excess of those received by the plaintiff upon the resale in a market distant from that provided in the contract.

In order to bind the defendant by the amount realized upon the resale it was necessary:

(1.) That notice of the resale be given to the defendant;

(2.) That the resale be made within a reasonable time, and

(3.) That the resale be made in the market of delivery and performance, or in the nearest available market.

In *Bagley v. Findley,* 82 Ill. App. 524, the Court held that to recover the difference between the contract price and the resale price notice of the sale must be given. If it is not given, the usual measure of damages will apply, to-wit, the difference between the contract price and the market price at the date and place of delivery.

In *Davis Sulphur Ore Co. v. Atlanta Guano Co.,* (Georgia), 34 S. E. 1011, the vendee became insolvent before the arrival of the goods sold under an executory contract of sale. Accordingly the seller exercised his right of stoppage in transitu and resold the goods without notice to the vendee. The Court, after setting forth the rights of the vendor, including the right to resell after notice to the defaulting buyer, says:

> "Unless the vendee has notice of the intention to resell he is not bound by the amount realized and this is right upon both principle and justice. The vendor acts as the agent of the vendee in making the sale and sells at the vendee's risk; and it would be unjust to hold the vendee bound, except where he has notice of the intention of the vendor to resell. If the vendee has notice, he may attend the sale, if a public one, and see that it is fair or whether the sale be public or private he may be able to bring about competition or to secure a purchaser who will give the full value of the goods. He may be able, in other words, to prevent loss to himself."

See also,

*Anderson Carriage Co. v. Gillmore,* 123 Mo. App. 19; 99 S. W. 766;

*Habenicht v. Lissak,* 77 Cal. 139;
*Morrell v. San Tomas Drying & Packing Co.,* 13 Cal. App. 305;
*Frisbie v. Rosenberg Bros. & Co.,* 11 Cal. App. 639;
*Bridges Grocery Co. v. Dan Grocery Co.,* 9 Ga. App. 189; 70 S. E. 964.

In *Dill v. Memford, et al.,* (Ind.) 49 N. E. 861, the Court speaking with reference to the right of the plaintiff to maintain an action for damages based upon the difference between the contract price and the resale price, says:

> "To acquire the right to maintain such an action it was incumbent upon them to give the buyer notice of the resale."

To the same effect see
*Pillsbury Flour Co. v. Walsh,* 110 N. E. 96.

In *Southern States Co. v. Long,* 73 So. 148, on the question as to whether or not the rejecting party is entitled to notice of the resale, the Court, after citing cases to the effect that such a question has been decided in both ways in Alabama, says:

> "The first case cited holds that notice is not essential to the seller's right to hold the purchaser for the difference between the contract price and the amount realized at the resale, but the other cases which are more recent hold that the purchaser is entitled to notice but as the failure to give notice only affects the measure of the plaintiff's recovery, it is a fact that may be offered under the general issue."

See also

*Sims-McKenzie Grain Co. v. Patterson* (Ga.), 73 S. E. 1080;

*Bennett v. Mann* (Ga.), 101 S. E. 706.

"Where the possession or control of goods is with the seller and the buyer refuses to accept them without legal justifiable cause, the seller after notice to the buyer, may, without breaching the contract on his part, resell the goods as the agent of the buyer, observing good faith and due care to conserve the purpose of that action."

*Johnson v. Carden,* 65 So. 813.

In *Faulk v. Richardson* (Fla.), 57 So. 666, the defendant refused to take and pay for an automobile purchased by him from plaintiff. Plaintiff thereupon and without notice to defendant resold the car. Upon action brought, the plaintiff was granted damages based on the difference between the contract price and the resale price. Upon appeal this judgment was reversed, and the Court says:

"The declaration does not measure the damages by the difference between the contract price and the market price but is measured by the difference between the contract price and the resale price in Pensacola. * * * Richardson upon his own showing owed some duty to Faulk to keep him advised of the status and cannot be permitted to pile up the damages against one whom he has kept in the dark."

See

*Benjamin on Sales,* p. 807.

"If the vendor sells at some other place than that agreed upon for the delivery of the prop-

erty he must show that the price realized was equal to or greater than the price which could have been realized had the sale been made at the place of delivery."

*Willson v. Gregory,* 2 Cal. App. 312;

*Ingram v. Mathier,* 3 Mo. 209.

In *Logan v. Carroll,* 72 Mo. App. 613, it was held that

"the vendor can recover the difference between the contract price and the price realized on the resale only when the resale is made after notice to the defaulting buyer."

See also

*Ricker v. Tenbroeck,* 63 Mo. 563;

*Anderson v. Frank,* 45 Mo. App. 482.

---

**UNDER THE LAW OF CALIFORNIA AND ALSO WASHINGTON IN ORDER TO HAVE THE PRICE REALIZED ON THE RESALE AS EVIDENCE OF THE MARKET VALUE OF THE COMMODITY RESOLD, IT IS NECESSARY THAT THE RESALE BE HAD IN THE SAME MANNER AS THAT OF A VENDOR FORECLOSING HIS LIEN.**

In the case at bar there is no evidence of the market value of dehydrated apples as of the date of delivery or of the market value thereof within a reasonable time after the date of delivery, save and except the evidence offered by witnesses for the defendant.

In order that the plaintiff in this action be granted as a measure of damage the difference be-

tween the contract price and the price realized upon the resale it must prove that it pursued in the resale the same course as that required of a vendor who sells to enforce his lien. In other words, the sale must be had in good faith, within a reasonable time after the date of delivery, after notice in the customary manner, and it must also be shown that the resale took place at the place of delivery or if there is no market there then in the nearest and most available market.

*Mechem on Sales,* Vol. 2, p. 1650.

If the resale is not had in the manner as set forth in the above authority, and in accordance with section 3049 of the Civil Code of the State of California, then the price realized upon the resale is not evidence of the market value of the commodity at the time and place of delivery called for in the contract or within a reasonable time thereafter, and the plaintiff must show that the price realized upon the resale was the highest market price at the time and place of delivery or within a reasonable time thereafter.

As we have heretofore said we submit that the resale taking place as it did at a period five months after the date fixed for delivery, in a market far distant from the place of delivery and not having taken place in the manner required of a vendor in foreclosing his lien is not evidence of the market value of the goods at the time and place of delivery or within a reasonable time thereafter. This being

so the only evidence of the market value of the commodity rejected at the time and place of delivery and within a reasonable time thereafter is that offered by the defendant and if any measure of damages is awarded to the plaintiff it must be based upon the evidence of the market value as shown by the witnesses for defendant. (Trans. pp. 62, 63, 64, 65.)

In *Hess v. Seitzick,* 95 Wash. 393; 163 Pac. 941, the respondent brought an action to recover from appellant damages for his failure to accept and pay for certain butter. The butter was purchased to be delivered at Seattle, subject to the inspection of the appellant (buyer). The butter arriving in Seattle in 1914, after inspection by the buyer was rejected. It was then stored in a warehouse. In December, about three months after the rejection, the seller sold the butter at a loss. No notice of the sale was given to the buyer. After judgment for the respondent the buyer appealed on the ground that the damages allowed were improper; that the true measure of damages was the difference between the contract price and the market price at the time and place of delivery. It was held:

> "On the failure of the buyer to comply with the contract of sale, the seller has of course three remedies:
>
> (1) It could store and hold the property subject to the buyer's order, and sue for the contract price;
>
> (2) It could resell the goods after notice to the buyer, and recover the difference between the price received and the contract price;

(3) It could retain the property as its own and recover the difference between the market value of the same at the time and place of delivery and the contract price, if the market price was less than the contract price. But, as it elected to keep the property it is clear that its measure of damages is found in the last of the three remedies mentioned."

The Court says further:

"After inspection it was rejected. The title therefore never passed but remained in the seller. The seller in such cases is not bound to resell in order to ascertain the value; he may either resell or rely upon other evidence of value, at his option. If he does resell he must, in order to have the result available as evidence of value, pursue, in substance, the same course as that required of a vendor who sells to enforce his lien; that is he must sell in good faith within a reasonable time after notice in the customary manner, and at the place of delivery, or, if there be no market there, then in the nearest and most available market." (Citing numerous cases and authorities.)

See also

*Gay v. Dare,* 103 Cal. 454.

In California the measure of damages awarded to a seller on the buyer's refusal to take and pay for personal property is

(1) If the property has been resold pursuant to section 3049 of the Civil Code the excess of the amount due from the buyer under the contract over the net proceeds of the resale.

Sections 3005, 3049 and 3311 of the Civil Code of the State of California, set forth the manner in

which vendors' liens must be foreclosed after the publication of notice and the other requirements necessary in order that a resale be binding as conclusive evidence of the value of the goods resold. If, however, the property has not been so resold the seller is awarded as damages the excess due from the buyer over the value to the seller including the expenses of carrying it to market. The value is estimated as the price the seller could have obtained in the market nearest to the place where it should have been accepted by the buyer at such time after the breach as would have sufficed for a resale.

Sec. 3353 Civil Code of the State of California.

It is thus plain that under the law of the State of California in executory contracts for the sale of personal property where title has not passed no notice of a resale is required for the reason that since the title has not passed it is not necessary to foreclose a vendor's lien and therefore section 3049 of the Civil Code of the State of California is not applicable. The value of the goods to the seller at such time after the breach as would have sufficed for a resale may be shown by any competent evidence. If, however, the rejected goods are resold pursuant to Section 3049, the amount realized on such a resale had is conclusive and no evidence is required of the market value of the date of the resale, providing it is made within a reasonable time after the date of delivery provided in the contract.

If the provisions of Section 3049 of the Civil Code are not followed a resale held privately may be made but it must be proved that the prices realized on the resale were the highest market prices prevailing on the date of the resale and the date thereof must be shown to be within such reasonable time after the date of delivery as would have sufficed for a resale and it must further be proved that if the goods are sold in a market distant from that provided in the contract that market was the nearest available market.

*Katzenbach v. Breslauer,* 51 Cal. App. 757; 197 Pac. 967.

It is to be noted here that the same provisions with reference to the foreclosure of liens in California are applicable to the foreclosure of vendor's liens in the State of Washington.

*Remington's Compiled Statutes of Washington,* Liens Section 1196 (Cd. '81, Sec. 1985; 1 H. C. Sec. 1704).

"Before the sale of property under execution order of sale or decree, notice thereof shall be given as follows.

In case of personal property by posting written or printed notice of the time and place in three (3) public places in the county where the sale is to take place, for a period of not less than ten days prior to the date of sale." (L. '03, p. 381; section 1; C. f L. '97, p. 265, section 1.)

In the case of

*David Hewes v. Germain Fruit Co.,* 106 Cal. 441,

the seller brought an action against the buyer for damages based upon the buyer's refusal to accept and pay for certain raisins tendered to him pursuant to a contract of sale. Title did not pass. The seller prayed for damages based on the difference between the contract price and the amount realized on the resale. After judgment for the plaintiff the defendant appealed contending that the plaintiff should have resold the raisins in the manner prescribed by Civil Code of the State of California for the sale of pledged property, and cited Section 3049 of the Civil Code. The Supreme Court after pointing out that the contract of sale was executory and no title had passed, says:

> "The sale of such property in the manner in which pledged property is required to be sold is not confined however to property, the title to which has passed to the buyer; but, if the property is sold in that manner where the title has not passed, such sale is conclusive as to the value of the property while, if it is not so sold, the plaintiff must prove the value of the property to him."

It is to be observed here that if the dehydrated apples in this case had been resold by the plaintiff in the manner required for the foreclosure of a vendor's lien, the amount realized upon the resale would have been conclusive as against the defendant. However, the resale was had in distant markets five months after the date of delivery provided in said contract and it must be admitted that if diligence in attending to the resale was had by the plaintiff the resale could have been made in a short time after

the date of delivery called for in the contract. This is proved by the testimony of witnesses for the defense that sales of similar commodities were had in California and other places both at the time of the date provided in the contract for delivery and for a reasonable time thereafter. (Trans.. pp. 62, 63, 64, 65.)

In *Meyer v. McAllister,* 24 Cal. App. 16, 140 Pac. 42, the action was for a breach of contract arising out of the refusal of the buyer to accept and pay for certain machinery. Within two months after the refusal the seller, without notice to the buyer, sold the rejected machinery at public auction. It was held:

> "(1) The sale was made without actual notice to the defendant. Therefore the amount received at the sale is not conclusive evidence of the value by which to measure the damages for which the defendant is liable;
>
> (2) For the same reason (and also because title had not passed from the vendor) the first subdivision of section 3311 of the Civil Code is not applicable to the case."
>
> "The detriment caused to the vendor by the defendant's breach of his agreement is to be measured by subdivision 2 of said Section 3311, and in the present case consists in the excess, if any, of the amount due from the buyer under the contract over the value to the seller."

See also Section 3353, Civil Code of the State of California;

*Madison v. Weil Zuckerman & Co.,* 48 Cal. App. 308, 192 Pac. 110.

In the case of

*Lund v. Lachman,* 29 Cal. App. 31, 154 Pac. 295;

the facts were as follows:

Defendant rejected a lot of wine bottles tendered to him by the plaintiff pursuant to a contract of sale. At a series of private sales held from July 6, 1911, to March 20, 1912, the plaintiff resold the bottles at various prices. Tender of delivery was made on June 16, 1911. There was evidence that the market price at the place of delivery as of the time of delivery and for a reasonable time thereafter was substantially higher than the contract price. The plaintiff having sued for the difference between the contract price and the price realized upon the resales which resales were had without notice to the defendant was granted only nominal damages. On the subject of the measure of damages the Court says:

> "The bottles having been sold at private sale, and it being an admitted fact in the case that title to the bottles had not passed from the plaintiffs, it is conceded, as it must be, that plaintiff's only remedy was damages for the breach of the contracts (Cuthill v. Peabody, 19 Cal. App. 304, 125 Pac. 926), and that the measure of the damages alleged to have been thereby sustained is to be found in section 3353 of the Civil Code, which provides that:
>
> 'In estimating damages, the value of property to a seller thereof is deemed to be the price which he could have obtained therefor in the market nearest to the place at which it should have been accepted by the buyer, and at such

time after the breach of the contract as would have sufficed, with reasonable diligence, for the seller to effect a resale.'

"While it was not incumbent upon the plaintiffs to make the resale immediately after the repudiation of the contract by the defendant, nevertheless the plaintiffs were required to exercise reasonable diligence in locating the nearest market, and ascertaining the prevailing market price for the rejected bottles; and there can be no doubt that there was sufficient evidence to justify the trial court in finding that, if the plaintiffs had seen fit to seek and take the market price for the bottles which prevailed on the day and for many days following their arrival and tender and rejection at San Francisco, they could have sold them at a substantial advance over the contract price which would have more than covered the expense of drayage, storage, and insurance for a reasonable time had such expense been found to be necessary, and therefore in no event would the plaintiffs have been entitled to recover such expense from the defendant."

In

*Rounsavall v. Herstein Seed Co.* (New Mexico), 186 Pac. 1078,

the facts were as follows:

Certain beans were sold by the appellant doing business in Kentucky to the appellee doing business in New Mexico at 15¢ per pound f. o. b. Trinidad, Colorado. Appellee rejected the beans and appellant sold them to a third party. The appellant offered no evidence of the market value at date of breach or at date of delivery and was granted

nominal damages. Upon appeal he contended his damages should have been the difference between the contract price and the resale price.

> "Appellee argues that the measure of damages was the difference between the sale price and the amount which the plaintiff was able to get for the beans after notice to the appellee of his intention to sell and after exercise of reasonable diligence to sell the beans at the best price obtainable. The general rule is well established that the measure of damages in such a case is the difference between the market value of the goods at the time and place of delivery and the contract price." Tufts v. Bennett, 163 Mass, 398, 40 N. E. 172; Mechem on Sales, §1690.

In

*Hughes v. Eastern Ry. & Lumber Co.* (Wash.), 161 Pac. 343;

the contract sued on was one for the sale and delivery of logs. The defendant rejected the logs. Appellant contended that the measure of damages was the difference between the contract price and the market price at the time of the breach. The Court says:

> "The general rule is that the measure of damages for the breach of a contract for the sale of a commodity, where the vendee refuses to accept delivery, is the difference between the contract price and the market value at the time and place agreed upon for delivery. (Citing cases.)

THE TENDER CLAIMED TO HAVE BEEN MADE BY PLAINTIFF WAS NOT MADE IN ACCORDANCE WITH THE TERMS OF WRITTEN CONTRACT AND THE EVAPORATED APPLES SOLD BY PLAINTIFF WERE NOT OF THE GRADE CONTRACTED FOR BY DEFENDANT.

The written contract entered into by the parties, a copy of which was attached to defendant's answer, provided for the sale of one car, sixty thousand pounds, *choice* evaporated apples at 18½¢. Immediately after the description of the merchandise sold appeared the following:

> "With provision that seller may be privileged to substitute grades *providing cannot fill order with grade ordered* at extra choice 19¢ fancy 19¾¢." (Italics ours.)

It is an elementary proposition of law which does not require any citation of authorities that the parties have a right to contract on such terms as they may desire and, unless the consideration or subject matter of the contract is illegal neither a court of law nor a court of equity has any right to substitute or make new terms for the contracting parties. In the instant case the parties saw fit to contract for the purchase and sale of sixty thousand pounds of *choice* evaporated apples and the defendant was entitled to the delivery of this grade at the stipulated price. They saw fit to insert the additional provision to the effect that if the seller *cannot fill the order with choice evaporated apples* it was privileged to substitute extra choice or fancy at advanced prices. Without adhering to the contract, and without giving any explanation therefor whatsoever, the

plaintiff attempted to tender and claims to have set aside and sold for the account of the defendant sixty thousand pounds of *extra* choice evaporated apples. This was certainly not a compliance with the terms of the contract, and such a sale cannot form the basis of a judgment for damages.

The correspondence will show that the defendant was of the opinion that it was purchasing evaporated apples manufactured at the Yakima plant of the plaintiff and that the plaintiff took the position that it was not obligated to make deliveries from the Yakima plant but was privileged to deliver any choice evaporated apples. The contract is silent as to the place of production and absolutely no showing of any kind was made to the effect that the plaintiff could not fill, either in whole or in part, the contract for sixty thousand pounds of choice evaporated apples. As long as choice evaporated apples were available in the market the defendant had a right to insist upon the delivery of that particular grade. We are not, however, required to go so far in our contentions as Dr. Cardiff testified that the plaintiff had about a half a car to a car of choice evaporated apples at its Yakima plant. (Tr. page 54.) These were available for shipment to the defendant, but the evidence will show that it was not until March 6th, 1920 (more than a month after the expiration of the time provided for the delivery of said apples), that the plaintiff offered to deliver any choice evaporated apples whatsoever in fulfill-

ment of said contract. (Defendant's Exh. D., Tr. pages 57, 58.)

The argument hereinabove made on the proper rule of the measure of damages that should apply in this case was made upon the theory that the plaintiff had sold evaporated apples of the identical grade and quality contracted for. We do not wish, however, to be understood as having waived the further objection that the evaporated apples sold were not of the grade and quality which the defendant was entitled to receive. There is a difference between the grade, quality and price of *choice* and *extra choice* evaporated apples. The defendant contracted for *choice* but in making a sale for the purpose of fixing its damages the plaintiff sold *extra choice* apples. By permitting the introduction of the evidence of such a sale and using it for the purpose of computing the damages awarded to plaintiff the Court erred.

In making a tender of extra choice apples and setting aside evaporated apples of that grade without making a showing on the trial that it could not fill the contract with choice evaporated apples, the plaintiff was guilty of breaching its contract. It being the first to have breached its part of the contract, it cannot maintain any action thereunder for the recovery of damages from the defendant.

*Minaker v. California Canneries Co.*, 138 Cal. 239;

*Wood, Curtis & Co. v. Seurich*, 5 Cal. App. 252.

In conclusion we submit that the trial Court clearly erred in admitting evidence and in adopting the measure of damage in computing the amount of judgment entered for the plaintiff.

Dated, San Francisco,
October 10, 1923.

Respectfully submitted,

FRED L. DREHER,
*Attorney for Plaintiff in Error.*

No. 4055.

IN THE

# United States Circuit Court of Appeals

## FOR THE NINTH CIRCUIT.

GARCIA & MAGGINI CO. (a Corporation),
*Plaintiff in Error,*

vs.

WASHINGTON DEHYDRATED FOOD CO. (a Corporation),
*Defendant in Error.*

# BRIEF FOR DEFENDANT IN ERROR

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*Attorneys for Defendant in Error.*

THE RECORDER COMPANY, 609 STEVENSON ST., S. F.

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No. 4055.

IN THE

# United States Circuit Court of Appeals

## FOR THE NINTH CIRCUIT.

GARCIA & MAGGINI CO. (a Corporation),
*Plaintiff in Error,*

vs.

WASHINGTON DEHYDRATED FOOD CO. (a Corporation),
*Defendant in Error.*

# BRIEF FOR DEFENDANT IN ERROR

Following the practice adopted in the brief of plaintiff in error, the parties to the action will herein be designated as they appeared in the court below, as plaintiff and defendant. The judgment was in favor of the plaintiff, from which the defendant appeals.

The opinion of Judge Bourquin, rendered in the District Court (Tr., pp. 27-31), opens with this statement:

> "In this action for breach of contract is no conflict in the evidence but only in the inferences of fact and upon which depend plaintiff's right to the amount of damages."

The evidence consisted largely of correspondence between the parties to the action. As the inferences to be drawn therefrom depend to a large extent upon the sequences of correspondence and events, we tabulate for convenience of reference the following

## CHRONOLOGY OF EVIDENCE.

*June 13, 1919:* Execution of contract between the parties to the action which provided for the shipment, during December, 1919, or January, 1920, at the seller's option, of sixty thousand (60,000) pounds "net choice evaporated apples" (Tr., p. 19). This contract did not designate the apples as Yakima apples or otherwise than as above stated.

*January 13, 1920:* Letter from plaintiff to defendant notifying the latter of the readiness of plaintiff to ship the car of apples covered by the contract, and requesting shipping instructions. This letter closed with the statement: "Should you elect to inspect these apples at time of loading, rather than accept our grades, we would advise that the applies will be loaded from our Wenatchee factory." (Plaintiff's Ex. No. 1, Tr., p. 33.)

*January 16, 1920:* Letter from defendant to plaintiff replying to above letter of January 13, requesting sample of apples and inquiring as to possibilities of storage thereof at Wenatchee. (Plaintiff's Ex. No. 2, Tr., p. 34.)

*January 17, 1920:* Telegram, plaintiff to defendant, again requesting shipping instructions. (Plaintiff's Ex. No. 3, Tr., p. 35.)

*January 17, 1920:* Telegram from defendant to plaintiff in reply to plaintiff's of even date, referring to letter of same date, and requesting that no shipment be made "until you hear definitely from us." (Plaintiff's Ex. No. 4, Tr., p. 35.)

*January 20, 1920:* Letter, plaintiff to defendant, advising of order for the forwarding of sample and investigation as to storage facilities. (Plaintiff's Ex. No. 5, Tr., p. 36.)

*January 22, 1920:* Telegram, plaintiff to defendant, advising as to storage facilities and requesting instructions. (Plaintiff's Ex. No. 6, Tr., pp. 36-37.)

*January 23, 1920:* Telegram, defendant to plaintiff, declining to accept shipment for the reason that plaintiff was tendering "choice Wenatchee stock whereas you sold us car choice Yakima from your Yakima evaporator." (Plaintiff's Ex. No. 7, Tr., p. 37.)

*January 24, 1920:* Letter, defendant to plaintiff, reviewing correspondence and concluding: "As explained in our wire we cannot deliver Wenatchee for Yakima and for the above reason cannot accept the car in question." (Plaintiff's Ex. No. 8, Tr., pp. 37-38.)

*January 24, 1920:* Telegram, plaintiff to defendant, reading: "We understand your wire twenty-third cancels order for car apples. Is this correct? Wire." (Defendant's Ex. A, Tr., p. 55.)

*January 24, 1920:* Telegram, defendant to plaintiff, reading: "Replying to wire even date, your un-

derstanding correct as tender made by you cancels contract dated June thirteenth nineteen nineteen." (Defendant's Ex. B, Tr., pp. 55-56.)

*January 28, 1920:* Letter, plaintiff to defendant, asknowledging receipt of defendant's letter of the 24th and stating that the car tendered is extra choice Yakima apples, and concluding: "At any rate, your contract did not call for Yakima apples. Therefore none of the contentions in your correspondence are valid." (Plaintiff's Ex. No. 9, Tr., pp. 39-40.)

*February 2, 1920:* Letter, defendant to plaintiff, referring to wire of January 24 as an agreement by plaintiff to concellation of contract. (Defendant's Ex. C, Tr., pp. 56-57.)

*February 13, 1920:* Letter, plaintiff to defendant, reading as follows: "Replying to your letter of the 2nd, will state that we have looked carefully through our correspondence and fail to find anything in the same where we have agreed to the cancellation of your order for a car of apples.

"You made a definite contract for a car of apples which was tendered you within the time limit of the contract and we shall expect you to take delivery of the same. Unless we receive shipping instructions from you on the car in question within a few days we shall sell the same and charge any difference to your account, bring suit to cover." (Plaintiff's Ex. No. 11, Tr., p. 41.)

*Between February 13 and March 6, 1920:* Segregation in warehouse of apples covered by contract and

notice by plaintiff to defendant of that fact. (Tr., p. 44 [bottom].)

*March 6, 1920:* Letter from plaintiff to defendant enclosing draft for contract price of apples with warehouse receipt attached and demanding payment. (Defendant's Ex. D, Tr., pp. 57-58.)

*February to July, 1920:* Unsuccessful efforts of plaintiff to sell the car of apples covered by the contract. (Tr., pp. 41-45.)

*July 30, 1920:* Sale of car of apples covered by contract to Libby, McNeill & Libby at Chicago at 11¾c per pound. (Tr., pp. 44 and 58.)

*September 24, 1920:* Collection from purchaser of proceeds of sale of car of apples. (Tr., p. 58, also p. 44.)

*September 25 1920:* Letter, plaintiff to defendant, notifying defendant of above sale, enclosing invoice and demanding payment of difference between the contract price and amount realized upon resale. (Plaintiff's Ex. Nos. 12 and 13, Tr., pp. 45-47.)

## ISSUES INVOLVED IN APPEAL.

The plaintiff in error states, upon pages 9 and 10 of its brief, that this appeal presents for adjudication four points. We shall discuss these in the order therein set forth.

The first two points presented by the plaintiff in error are correlated, as the answer to both depends upon the inferences to be drawn from the correspondence between the parties. We, therefore, consider them together.

## I.

## THE CONTRACT BETWEEN THE PARTIES, UPON WHICH SUIT WAS BROUGHT, WAS NOT CANCELED BY ANY CONSENT OR AGREEMENT ON THE PART OF PLAINTIFF, NOR DID THE PLAINTIFF ACCEPT OR ACT UPON ANY ATTEMPTED CANCELLATION OF THE CONTRACT BY DEFENDANT.

The argument by plaintiff in error upon the above referred to issues is based upon the telegrams between the parties of January 23 and 24, 1920. These telegrams must be considered in connection with what had preceded them and with what followed. It is to be noted:

1. The notice from plaintiff to defendant of readiness to ship was dated January 13, 1920. (Plaintiff's Ex. 1, Tr., p. 33.) During the following ten days the inquiries by defendant were as to samples and storage facilities.

2. The refusal of defendant to accept delivery under the contract was dated January 23, 1920, and was based entirely upon the fact that the tender was of "choice Wenatchee stock whereas you sold us Yakima from your Yakima evaporator." (Plaintiff's Ex. No. 7, Tr. p. 37.)

3. The contract did not specify Yakima stock nor in any way refer to the same. (Tr., p. 19.)

4. The letter from defendant to plaintiff of January 24, 1920 (Plaintiff's Ex. No. 8, Tr., p. 38), places

the refusal to accept upon the same unwarranted statement with regard to a contract for Yakima apples.

5. On January 20 plaintiff ordered a sample of the apples proposed to be shipped to be sent to defendant. This sample was doubtless in the possession of defendant when its telegram of January 23 and letter of January 24 were written. (Plaintiff's Ex. No. 5, Tr., p. 36.)

6. The wire from plaintiff to defendant of January 24, 1920 (Defendant's Ex. A, Tr., p. 55), was evidently an inquiry by the plaintiff as to whether the defendant was attempting to cancel its order as covered by the contract. If this wire is to be construed technically, it is to be noted that it does not inquire as to the cancellation of the contract but only as to the cancellation of the defendant's order. This cannot be tortured into a consent by the plaintiff to a cancellation of its acceptance of the order or a release by plaintiff of the defendant from its liability under the contract.

7. The telegraphed reply from defendant to plaintiff, of the same date (Defendant's Ex. B, Tr., pp. 55-56), places the attempted cancellation upon the tender made by the plaintiff ("Tender made by you cancels contract."), which defendant claimed to be of Wenatchee apples in place of Yakima apples, to which defendant claimed to be entitled. This claim was entirely without any foundation in the terms of the contract. Furthermore, the testimony of the president of plaintiff clearly proved that the apples tendered were labeled as Yakima apples which was a general term covering all apples produced in the Central Wash-

ington district, and that there was virtually no difference between those produced at Yakima and Wenatchee. (Tr., pp. 39-40.)

8. If, as claimed by defendant, the wire from plaintiff of January 24 could be construed as a cancellation by plaintiff, defendant did not accept nor act upon such cancellation, but relied entirely upon its claim that plaintiff's *tender* was a cancellation of the contract. Therefore, the argument that cancellation was first suggested by plaintiff, and that defendant relied upon such cancellation, is entirely without foundation in the evidence. Defendant's telegram and letter of January 24 are both conclusive that it had no thought of claiming a cancellation of the contract, except as the result of plaintiff's tender. It is undisputed that the objection to such tender was unfounded and it has never been insisted upon by defendant.

9. The wire from defendant to plaintiff of January 24 was elaborated in the letter of the same date (Plaintiff's Ex. No. 8, Tr., pp. 37-38). In the ordinary course of mail that letter would reach the plaintiff at Yakima, Washington, in approximately three days. On January 28, only four days after the date of the letter mailed by defendant at San Francisco, the plaintiff replied and stated that "none of the contentions in your correspondence are valid." It is, therefore, beyond dispute that if defendant could have been misled by the telegraphic inquiry from plaintiff of January 24, such impression could not have persisted after the receipt by defendant of the letter from plaintiff of January 28, or for more than one week. Furthermore, it is clear that plaintiff promptly re-

pudiated the attempt of defendant to relieve itself of liability under the contract. The same position was reiterated by plaintiff in its letter to defendant of February 13. (Plaintiff's Ex. No. 11, Tr., p. 41.)

As stated in the opinion of Judge Bourquin (Tr., p. 28), this correspondence shows that "defendant rather strategically sought to impress plaintiff with the idea that therein the latter had agreed to rescind; but plaintiff repudiated that version of its language and acts and insisted upon the contract." This opinion further shows that the contention of the defendant upon the trial was for a rescission on its part which was acquiesced in by the plaintiff. In response to that contention, Judge Bourquin says:

> "Rescission by claim thereof by one party acquiesced in by the other, appears from conduct of the latter, (1) affirmative acts inconsistent with continuance of the contract or (2) negative acts of silence or delay calculated to and that do inspire the claimant of rescission with belief of consent, and upon which he acts or fails to act to his prejudice if the fact be otherwise, a variety of estoppel. In principle rescission by acquiescence has no other support or justification. That is not this case and there was no rescission."

Applying the above succinct and forcible statement of the law to the facts disclosed by the record in this case, the only affirmative act on the part of plaintiff was the telegram of inquiry of January 24, 1920, which cannot possibly be construed as a consent, either to the cancellation of the contract, or to the breach thereof by the defendant. There is no basis for a claim of negative acts of silence or delay for the reason

that plaintiff repudiated the attempted strategical construction of its telegram sought to be adopted by the defendant promptly and in the ordinary course of mail.

The question of cancellation of the contract is dependent entirely upon the intent of the parties as disclosed by their acts and correspondence. The principles of law applicable thereto are so elementary that we will not attempt any extensive citation of authorities.

Cancellation of a contract means that the parties to *one* agreement have, by a *second* agreement, given up their rights under the original agreement. The same elements of a contract must be found in the second agreement as in the first. There must be a meeting of the minds through offer and acceptance, as in every other contract. This is forcibly stated by the Supreme Court in

> *Wheeler* v. *New Brunswick & Canada R. R. Co.*, 115 U. S. 29-34, 29 L. Ed. 341.

The Court say (at p. 34):

> "It is to be observed that to annul or set aside this contract fairly made, requires the consent of both parties to it, as it did to make it. There must have been the same meeting of minds, the same agreement to modify or abandon it that was necessary to make it."

Was there any such meeting of minds upon cancellation in the case at bar? The defendant offered to cancel by declining to accept the tendered apples. Did the plaintiff accept such offer, or agree to the defendant's proposal? It is argued on behalf of the defend-

ant that the plaintiff's telegram was in effect such an acceptance. To find an acceptance, it is essential that we find some evidence of an intention on the part of the plaintiff to cancel the contract, but the telegram on the face of it shows that it was a mere inquiry concerning the defendant's state of mind, seeking to ascertain whether the defendant really intended to breach the contract. The words of the telegram are entirely silent with regard to the plaintiff's state of mind, and indicate no intention whatsoever to cancel the contract. It is quite evident that there was no acceptance of any proposal of cancellation made by the defendant so as to make a new and binding agreement. The element of mutual assent, which is so essential to a contract, was entirely lacking. The necessity for such mutual assent is very clearly brought out by the judge in the very case on which the defendant places its chief reliance, viz.:

> *Schwab Safe & Lock Co.* v. *Snow*, 47 Utah 199, 152 Pac. 171.

At page 173 the Court say:

> "The defendant had the right at any time, for any reason or for no reason, to cancel a particular order, and *if the plaintiff joined in the proposal,* for cancellation, that ended the contract."

The defendant in this case did not construe this telegram of the plaintiff as an acceptance of its proposed cancellation, for in its reply, of the same date, it does not state that the plaintiff's telegram contained a cancellation of the contract, but expressly says: "tender made by you cancels the contract." It is quite evident that the parties used the word "cancelled" with

the thought that a single person could cancel a contract; as, for example, the words "tender made by you cancels contract." It is fundamental and elementary in the law of contracts that no rescission of a contract or cancellation, in the sense of rescission, can be made by a single act of any one party, but that it is necessary that two minds meet in order to effect such a cancellation.

It would, indeed, be a new theory in the law of contracts that a proposal or offer might be accepted by an inquiry as to the intent of the proposer.

The case of *Schwab Safe & Lock Co.* v. *Snow,* relied on by defendant, is entirely different from the case at bar. In the Schwab case there is a clear offer and acceptance. A comparison of the offers and acceptances of the two cases will succintly bring out their difference.

| *Offer of Schwab Case.* | *Offer of Case at Bar.* |
|---|---|
| "We feel very much grieved in having to request you to cancel the order of W. H. Bishop for No. 160 which you have had since Nov., 1906." | "Referring your letter twentieth and wire twenty-third you are tendering us Choice Wenatchee stock whereas you sold us car Choice Yakima from your Yakima Evaporator Stop We sold Yakima and cannot tender our buyer Wenatchee Therefore cannot accept." |
| *Acceptance of Schwab Case.* | *Acceptance of Case at Bar.* |
| "We are *also* grieved that it is necessary to cancel the Bishop No. 160 but it is impossible for us to fill the order in full." | "We understand your wire 23rd cancels order for car apples. Is this correct? Wire." |

It can readily be seen that the two cases are entirely different when the elements of each are analyzed and placed side by side. In the Schwab case there was a mutual assent. In the case at bar there was an inquiry as to the meaning of an offer. By what possible construction can it be argued that the minds of the parties met? The Schwab case is further distinguished from the case at bar by the fact that in that case the contract was sought to be enforced by the party who first sought its cancellation; while here the complaining party is the one not in default.

The simple question is, therefore, did the plaintiff assent to the abandonment of the contract? The evidence negatives any such assent. The telegram of inquiry of January 24, 1920, does not so indicate, and the attempt of defendant to "strategically impress plaintiff" with that idea was promptly and emphatically repudiated by plaintiff.

## The Market Was Unfavorable at the Time of the Breach of the Contract.

The argument of plaintiff in error in attempting to sustain a cancellation of the contract is based partly upon the assertion that the market for dehydrated apples was strong and favorable during the months of January and February, 1920. That statement is made several times in the brief of its counsel. The evidence upon this point is as follows: Ira D. Cardiff, the president of the plaintiff company, testified that he had been in the dried fruit business for a number of years; that his business required him to become familiar with the market for dehydrated or dried

apples in the State of Washington and throughout the country; that he devoted a great deal of time familiarizing himself with markets, as that was one of his chief duties (Tr., p. 32); that in the months of January and February, 1920, there was no such thing as a market in the generally accepted use of that term in the trade, for the reason, among others, that the government was then bringing back evaporated apples and other fruits from Europe and throwing them upon the market; that these conditions prevailed during the months of January to April, inclusive, of 1920; that he made extensive efforts to sell the apples and traveled through the country for that purpose, both quoting prices and soliciting offers, and was not able to make a sale until July, and then at a reduced figure (Tr., pp. 43-44). This evidence is sufficient to warrant and sustain the finding that there was no market for the apples in question at the time of the breach of the contract, and to justify the acceptance of the resale price as the measure of the value of the rejected apples to the seller. As against this evidence defendant produced a witness who was in the dried fruit business at San Francisco at the time of the breach of the contract, who testified to sales made by him in San Francisco in the early part of 1920. The defendant also offered in evidence a trade paper published in San Francisco, giving quotations. It is to be noted that all the prices given by defendant's witness and contained in the quotations were less than those specified in the contract in suit. It is clear, therefore, that upon the defendant's own evidence there was no inducement to the plaintiff to consent to a cancellation or aban-

donment of the contract while upon the same evidence, and particularly as explained by the uncontradicted testimony of the plaintiff's president, which was believed and adopted by the trial court, there was every inducement for that action on the part of the defendant.

The statement on pages 26 and 27 of the brief of plaintiff in error that "the market price for dehydrated apples of the quality and kind contracted for f. o. b. Pacific Coast rail shipping point was between 17½ and 20c per pound"; and the attempt to measure the damages by a computation of an average or mean market price between these figures is misleading. Defendant's witness, Oppenheimer, testified (Tr., p. 60) that the fair market value of choice evaporated apples at San Francisco at the end of January, 1920, was between 17c and 19c, and from one to two cents lower in February. Upon his cross-examination, however, he admitted that there was not an active market for dried apples at any time in 1920 and that the market grew constantly worse from the commencement of that year and as the year advanced; and further that his testimony was based upon sales which his firm had made itself; that they sold about three carloads in January, 1920, and two carloads in February, 1920, and that it was very difficult to make sales of any carload lots in March, 1920. It further appeared that the only definite sales to which he could testify was 1200 boxes (one carload) on January 8, 1920, at 18c per pound, and 76,000 pounds in February, 1920, at 15c per pound. (Tr., pp. 61-62.)

The only mention of the price of 20c was in the

trade paper containing quotations of apples in 50-pound boxes, as follows: Choice at 17¼c; Extra Choice at 18c and 18¼c; Fancy at 20c. It was admitted that "fancy" apples were a better quality than "extra choice" and brought a higher price. The apples here involved were "extra choice." It is also evident and was admitted upon the trial, that the price for apples in 50-pound boxes in less than carload lots was higher than the price for carload lots, and that the price of the former does not control the latter. There was no proof that the quotations read from the trade paper were for carload lots.

The evidence submitted by defendant fails to establish a market price for the apples involved in this suit which can be used as any measure of damage herein, for several reasons.

Delivery under the contract in suit was to be had in Washington. If these particular apples had been sold in San Francisco, freight to that market would have had to be deducted from the selling price in order to establish the net value to the seller. Upon the trial the court called attention to the fact that f. o. b. price Pacific Coast shipping point would not be controlling if the apples were bought in Washington and shipped to California for sale. A statement was made that further evidence would be offered on the question of delivery, but no such evidence was produced. (Tr., p. 65.)

Furthermore, all the evidence of defendant is corroborative of the testimony of plaintiff's president that there was no general market for dried apples at the time of the breach of the contract, and that the

price was constantly declining, and few, if any, sales were being made.

Having elected to segregate the apples, store them for defendant, and subsequently sell them on defendant's account, plaintiff is not bound in any event by the market price at the time of the breach. Inasmuch, however, as plaintiff in error seems to rely to a large extent upon its alleged proof of a favorable market at the time of the breach of the contract, the above reference to the evidence is made; and it is submitted that there is no proof in the record of a favorable market either at the time of the breach or at any time thereafter.

## II.

## MEASURE OF DAMAGES.

### A. Remedies of the Seller Upon Breach of Contract by the Buyer.

Where the buyer has breached the contract, the seller has open to him three different remedies, any one of which he may elect to pursue.

First, he may store or retain the property for the vendee and sue him for the entire purchase price.

Second, he may sell the property and recover the difference between the contract price and the price obtained on such resale.

Third, he may keep the property as his own and recover the difference between the market price at the time and place of delivery and the contract price.

*Pabst Brewing Co.* v. *E. Clemens Horst Co.*, 229 Fed. 913 (Circuit Court of Appeals, Ninth Circuit, 1916).

At page 916 Judge Rudkin says:

> "Upon the breach of a contract of sale by the purchaser the seller is at liberty to fully perform on his part, and when he has done all that is necessary to effect a delivery of the property, so as to pass title to the purchaser, he may store or retain it for the purchaser, or he may resell it as agent for the purchaser. If he pursues the former course he is entitled to maintain an action for the contract price of the goods. If he pursues the latter his recovery will be the difference between the contract price and the net proceeds of the sale. But it is not obligatory upon him to adopt either of these courses, and if he does not care to do so he is entitled to recover the difference between the contract price and the market price or value of the property at the time and place of delivery fixed by the contract."

Williston on Sales, page 935:

> "Sec. 555. Different remedies allowed by the law in the United States. In a leading New York case the court said: 'The vendor of personal property in a suit against the vendee for not taking and paying for the property has the choice ordinarily of either one of three methods to indemnify himself: (1) He may store or retain the property for the vendee and sue him for the entire purchase price; (2) he may sell the property, acting as agent for this purpose of the vendee, and recover the difference between the contract price and the price obtained on such resale; or (3) he may keep the property as his own and recover the difference between the market price at the time and place of delivery and the contract price.' This statement of law is frequently quoted exactly or substantially, and generally no distinction seems to be taken between cases where title to the goods in question has passed and cases where it has not passed."

These remedies have been recognized and applied by the courts of both Washington and California.

> *Schott* v. *Stone-Fisher etc.,* 35 Wash. 252, 77 Pac. 192 (1904);
> *Lillie* v. *Weyl Zuckerman & Co.,* 45 Cal. App. 607, 188 Pac. 619 (1920).

In the case at bar the plaintiff clearly elected to pursue the second remedy outlined above, notifying defendant to that effect on February 13, 1920. (Plaintiff's Ex. No. 11, Tr., p. 41.)

B. Measure of Damages Where the Plaintiff Has Elected to Sell the Goods and Hold the Buyer for the Difference Between the Resale Price and the Contract Price.

In such a case the true measure of damages is the difference between the contract price and the net proceeds of the sale realized by the seller.

> *Frederick* v. *American Sugar Refining Company,* 281 Fed. 305 (Circuit Court of Appeals, Fourth Circuit, 1922).

The above cited case is on all fours with the case at bar. It was a suit for breach of contract for sale of sugar. Delivery was tendered in August, 1920. The price of sugar having declined, owing to a world-wide deflation of prices, the defendant refused to receive the same. Plaintiff then notified the defendant that unless defendant took the sugar it would be sold on his account. The sugar was sold in December and

January, five months after the breach of contract. Plaintiff demanded the difference between the price of resale and the contract price. Defendant requested a finding that the damage should be based upon the difference between the market price at the time the defendant notified the plaintiff of the refusal to accept the goods and the contract price. The court, dealing at length with the authorities, expressly disapproved the measure of damages contended for by defendant and adopted that relied upon by plaintiff.

The Court say, at page 308:

> "Under this instruction, the defendant would have placed upon the plaintiff the responsibility of the defendant's failure to carry out his contracts, and he had no right, upon his open breach of the contracts, to ask the plaintiff to hazard the responsibility of a further decline in the market. This was a risk the defendant invited by failing to keep his contracts with the plaintiff. The plaintiff had in all respects complied with the contracts, by making the shipments of sugar according to their terms, and was entitled to be paid the amount due. The defendant saw fit to refuse to take what he had bought, and apparently abandoned the purchase, which gave the plaintiff the right to sue at once for the entire breach of the contracts, or to pursue the course that was pursued here, of endeavoring to realize what could be procured from the abandoned purchase, upon due notice to the purchaser, and sue for the residue in case of loss."

*Arkansas Short Leaf Lumber Co.* v. *Hemler,* 281 Fed. 914 (Circuit Court of Appeals, Eighth Circuit, 1922).

Upon facts largely similar to those in the case last cited, the Court say (p. 917):

> "We do not think the plaintiff could be held to the exact date of the refusal by the defendant to take the logs in estimating his damages; he had the right, using reasonable diligence, to find a purchaser. In the absence of other evidence as to the market price, the price obtained on the resale, immediately or within a reasonable time after the breach of the contract, might be regarded as the market price; the plaintiff, of course, using due diligence and making all reasonable efforts to obtain the best price."

The same measure of damage is again applied in *Central Commercial Co.* v. *Jones-Dusenbury Co.,* 251 Fed. 13 (Circuit Court of Appeals, Seventh Circuit, 1918).

The Supreme Court of Washington has announced the same rule in

> *Carlisle Packing Co.* v. *Deming,* 62 Wash. 455, 114 Pac. 172 (1911).

In that case the defendant refused to accept salmon in accordance with the terms of its contract. Plaintiff tendered the goods in February, which tender was refused. Thereupon plaintiff notified defendant that the fish would be offered for sale and defendant held for the difference. The market was slow and plaintiff did not succeed in selling the goods until late that year, nine months after the breach of contract. The court allowed as damages the difference between the contract price and the resale price. At page 460 of the official report and page 173 of 114 Pacific Reporter, the Court say:

> "The respondent had sold its own goods for the best prices obtainable and its measure of damage

was the difference between the selling price and contract price provided the contract and the breach of it were established."

To the same effect is

*Carver-Shadbolt Co.* v. *Cline,* 69 Wash. 586, 125 Pac. 944 (1912).

The measure of damages to be allowed upon breach of contract is not a matter of remedy controlled by the law of the forum, but is a substantive right of the parties to be determined by the law of the place of performance—in this case by the law of the State of Washington. This has been definitely determined as to allowance of interest upon contracts by the Supreme Court in the case of

*Coghlan* v. *South Carolina Ry. Co.,* 142 U. S. 101, 35 L. Ed. 951.

The same rule has been applied to the determination of the measure of damages in

*Berlet* v. *Lehigh Valley Silk Mills,* 287 Fed. 769 (Circuit Court of Appeals, Third Circuit, 1923).

In that case the contract was made in New Jersey to be performed in Pennsylvania. One of the contracting parties asserted a lien on the goods. The other party having become insolvent, the question arose as to what law should control the validity and effect of the lien. Upon that question the Court say (p. 771):

"It is a general and well settled principle of law that contracts made at one place to be performed at another are governed by the law of the place of performance."

In *Sandham* v. *Grounds,* 94 Fed. 83 (Circuit Court of Appeals, Third Circuit, 1899), at page 83, the Court say:

> "We cannot doubt that the damages in this case must be determined by the laws of the State of Pennsylvania where the contract was to be performed and where the assets of Smith's estate are properly distributable."

12 C. J. 486:

> "Questions as to the elements and amount of damages recoverable for a breach of contract or a violation of a duty growing out of a contract pertain to the right, and not to the remedy, and are governed by the lex loci contractus."

But even if the damages should be computed under the law of California, as contended for by plaintiff in error, no different result will follow. In that state the law upon the subject has been codified in the following sections of the Civil Code:

> "Sec. 3311. Breach of Agreement to buy personal property. The detriment caused by the breach of a buyer's agreement to accept and pay for personal property, the title to which is not vested in him, is deemed to be:
>
> 1. If the property has been resold, pursuant to section three thousand and forty-nine, the excess, if any, of the amount due from the buyer, under the contract, over the net proceeds of the resale; or,
>
> 2. If the property has not been resold in the manner prescribed by section three thousand and forty-nine, the excess, if any, of the amount due from the buyer, under the contract, over the value to the seller, together with the excess, if any, of the expenses properly incurred in carrying the

property to market, over those which would have been incurred for the carriage thereof, if the buyer had acepted it."

"Sec. 3353. Value, how estimated in favor of seller. In estimating damages, the value of property to a seller thereof is deemed to be the price which he could have obtained therefor in the market nearest to the place at which it should have been accepted by the buyer, and at such time after the breach of the contract as would have sufficed, with reasonable diligence, for the seller to effect a resale."

Section 3049, referred to in Section 3311, is as follows:

"Sec. 3049. Lien of seller of personal property, One who sells personal property has a special lien thereon, dependent on possession, for its price, if it is in his possession when the price becomes payable, and may enforce his lien in like manner as if the property was pledged to him for the price."

Under these sections, it has been held that the seller may recover the difference between the contract price and the resale price even though the sale is a private one.

*Lillie* v. *Weyl Zuckerman Co.*, 45 Cal. App. 607, 188 Pac 619 (1920), was an action on a contract for refusal to take potatoes at the contract price of $2.40 per unit. Delivery was tendered in July, according to the terms of the contract. Defendant refused to accept the tender. Later the plaintiff sold the potatoes at $1.40 per unit and sued for the difference. No notice of resale was given to the defendant. The Court held that the plaintiff could recover the differ-

ence between the contract price and the price obtained on resale. At page 610, it is said:

> "Under Sections 3311 and 3353 of the Civil Code, the measure of damages, where title is not vested in the purchaser and the property not resold in the manner provided by Section 3049—which is the case here—is the difference between that which the purchaser agreed to pay and the value of the property to the seller on the resale thereof, which value is deemed to be the price obtainable therefor in the nearest market to the place at which it should have been accepted by the buyer."

In *King* v. *Globe Grain & Milling Co.*, 58 Cal. App. 105, 208 Pac. 166 (1922), at page 169, the Court say:

> "Ordinarily where, as in the instant case, the seller has made a resale, the detriment caused by the breach of the buyer's agreement to accept and pay for the property, the title to which is not vested in him, is deemed to be the excess, if any, of the amount due from the buyer under the contract over the net proceeds of such resale."

There is no such statutory provision in Washington and the law of that state does not require the sale to be made at public auction. The section of the Washington statute, quoted on page 42 of the brief of plaintiff in error, refers to "the sale of property under *execution, order of sale or decree,*" and has no application to the law of sales or measure of damage.

Under the California statutory provisions it is thoroughly well established that if property has been resold in the manner prescribed for a pledgee's sale, as provided in Section 3049 of the Civil Code, such

resale is a *conclusive* measure of the damage, but if a resale has been made without complying with the provisions of the sections above referred to, the price received upon resale is evidence (although not conclusive) of the value to the seller and, therefore, of the measure of damage.

In *Hewes* v. *Germain Fruit Co.,* 106 Cal. 441 (1895), the Court say, at page 446:

> "The sale of such property in the manner in which pledged property is required to be sold is not confined, however, to property the title to which has passed to the buyer; but, if the property is sold in that manner where the title has not passed, such sale is conclusive as to the value of the property, while, if it is not so sold, the plaintiff must prove the value of the property to him; and this value was found by the court upon sufficient evidence."

The same rule has been adopted by the Supreme Court of California in cases where title has passed.

In *Phillips* v. *Stark,* 186 Cal. 369 (1921), at 374, the Court say:

> "But where, as here, although the title has passed, the vendor still retains the property, the value of the property must be offset against the purchase price. The vendor may not have both the full purchase price and the property. It is quite immaterial in the present case upon what theory this is worked out, whether upon that suggested by us, that by repudiating the contract and thrusting the property back on the plaintiff, the defendants put him in the situation of a vendor under an executory contract, in which case the measure of damages is the difference between the contract price and the market value of the prop-

> erty (Civ. Code, Secs. 3311, 3353), or upon that suggested by *Bennett* v. *Potter,* that the vendee is responsible for the full purchase price under Section 3310 of the Civil Code, but the vendor is liable to the vendee in damages for a conversion. The result is the same in either case, since the measure of damages for a conversion is the market value of the property. (Civ. Code, Sec. 3337.)
>
> "(4) The other thing that we would add is that the complaint is defective in not alleging the market value of the property. It does allege the amount for which it sold on the resale, and this was evidence of the market value (*Meyer* v. *McAllister,* 24 Cal. App. 16 [140 Pac. 42]), but the allegation was only one of an evidentiary and not of an ultimate fact. No point was made of this defect, and it could easily have been cured if point had been made of it. The judgment against the plaintiff should not, therefore, be sustained by reason of it."

Under the California law, in the event of sale without compliance with Section 1049 of the Civil Code, the value to the seller must be determined from a preponderance of evidence in the case, of which the resale price is the most persuasive, and, in mose cases, the conclusive, factor. In the case at bar, the evidence is positive on the part of plaintiff that the resale was made as soon as reasonably practical, by a competent and prudent salesman in the exercise of diligence and inspired by honesty of purpose and fair consideration for the defendant as well as for the plaintiff, as stated in Finding No. 5 of the District Court (Tr., p. 24) and in the opinion of Judge Bourquin (Tr., p. 30). The only evidence of any other value are the statements of the one witness produced by defendant as to values based on certain sales made by his firm in San

Francisco, and market quotations from a trade paper published at the same place, which latter were made up from hearsay evidence of asking prices, without knowledge of actual sales. (Cross-examination of witness Bartholime, Tr., pp. 65, 66.)

The diligence and good faith of the plaintiff are beyond question for the reason that its president spent his time from February to July in attempting to make a sale of these apples, during all of which time the plaintiff was in possession of three other cars of similar apples belonging to itself and which it was also endeavoring to sell. The sale of its own apples was not effected until about a year later, and then at less than half the price which was realized upon the sale of the defendant's apples. (Tr., pp. 49-50.) (Judge Bourquin's opinion, Tr., p. 29.) In other words, as stated by the president of the plaintiff, "we made constant and vigorous efforts to sell them" (Tr., p. 50), but in spite of such efforts plaintiff could not realize upon the defendant's apples until July, 1920, and then gave the defendant the benefit of the first sale, holding its own goods, which were in all respects similar, for an additional year and then selling them at less than half the price for which defendant received credit.

### C—Binding Effect of Resale Price.

On page 33 of its brief, plaintiff in error states:

> "In order to bind the defendant by the amount realized upon the resale it was necessary:
>
> (1) That notice of the resale be given to the defendant;
>
> (2) That the resale be made within a reasonable time, and

(3) That the resale be made in the market of delivery and performance, or in the nearest available market."

The District Court found that the plaintiff had complied with all of the above requirements, and it is submitted that that finding is sustained by the evidence. By notice of resale, specified by plaintiff in error in its requirement No. 1, the most that is required under any view of the law is a notice of *intention to resell.* The reasonableness of the time within which it is required that such resale be made is dependent on the circumstances of the case. As shown by the case cited in Judge Bourquin's opinion, it has been held that a delay of two years was not unreasonable under certain circumstances. The evidence of the president of the plaintiff shows that the efforts to resell were energetic and continuous and made in the usual method prevalent in the trade, first by offering the goods through brokers, secondly by soliciting offers from brokers, and finally by personal travel by the president of the plaintiff corporation throughout the country in an effort to resell, and that the earliest sale that could be made under all these circumstances was in July 1920, and that Chicago was the nearest and only available market at that time. The evidence of both plaintiff and defendant shows that the market price for these apples was constantly declining during the first half of the year 1920, the reason therefor being clearly stated by the president of the plaintiff corporation. The defendant's witness, who testified to sales in San Francisco, stated that on January 8, 1920, he sold 1200 boxes of extra choice

evaporated applies at 18c, and on February 17, 1920, he sold 76,000 pounds at 15½c (Tr., p. 62), and the quotations from the trade journal show the constant decline during the time in question.

1. Notice of Time and Place of Resale to be Distinguished From Notice of Intention to Resell.

It may readily be seen, upon analysis, that notice of resale may cover two entirely different stiuations between which it is necessary to distinguish, otherwise an erroneous application of authorities may result.

Confusion appears in the brief of plaintiff in error (and in some decisions) by failure to distinguish between the necessity of notice to the defaulting purchaser of *an intention to resell,* and notice of the *time and place of such resale.* By the weight of authority (with contrary rule in some jurisdictions) it is held that after a positive breach by the purchaser, no notice by the seller of even an intention to resell is necessary.

Williston on Sales, Sec. 548:

> "Notice that resale is to be made.—In some cases it has been held that in order to bind the buyer by a resale, the seller must have given notice of his intention to make a resale. *But by the weight of authority there is no such absolute requirement.*"

The Uniform Sales Act, which has been adopted in many states, section 60, subsection 3, provides:

> "It is not essential to the validity of a resale that notice of an intention to resell the goods be given by the seller to the original buyer."

However, it is not necessary to discuss this question, since in the case at bar the seller did notify the buyer of his intention to resell the goods.

While there is some conflict of authority upon the above proposition, there is practically no conflict upon the further rule that if a notice of intention to resell has been given to the purchaser, no further notice of the time and place of resale is necessary.

Williston on Sales, Sec. 549:

> "Notice of time and place of sale.—Though as appears from the preceding section, some courts have held the seller bound to give notice of his intention to resell the goods, it seems uniformly agreed that there is no legal requirement of notice of the time and place where the sale will be held."

In the case of

> *Frederick* v. *American Sugar Refining Co.*, 281 Fed. 305 (supra),

no notice of time and place of sale was given, yet the Circuit Court of Appeals for the Fourth Circuit allowed as damages the difference between the contract price and the resale price.

So also in

> *Arkansas Short Leaf Lumber Co.* v. *Hemler*, 281 Fed. 914 (supra);
> *Carlisle Packing Co.* v. *Deming*, 62 Wash. 455, 114 Pac. 172 (1921) (supra).

In the last case the plaintiff notified the defendant of its intention to sell the goods but did not later advise defendant of the time and place of sale. Nevertheless

the court allowed as a measure of damages the difference between the contract price and the price of resale.

> *Katzenbach* v. *Breslauer,* 51 Cal. App. 756, 197 Pac. 967 (1921).

This was an action against defendant for breach of contract for failure to purchase a carload of soda. Defendant refused to take the goods on arrival. Plaintiff sold the goods at San Francisco. The court allowed as damages the difference between the contract price and sale price. The court held that notice of time and place of sale was not necessary.

In the case at bar a definite notice was given by plaintiff to defendant of its intention to resell the apples. This notice was dated February 13, 1920 (Plaintiff's Ex. No. 11, Tr., p. 41). As stated by the District Judge, "having notified defendant it would resell, plaintiff, in a hunt for a market and a purchaser, was under no obligation to also give notice of the time and place. (Mechem, Sales, sec. 1637.)" (Tr., p. 30.)

Section 1637 of Mechem on Sales, referred to in the above quotation from Judge Bourquin's opinion, is as follows:

> "Notice of Time and Place of Resale.—But whatever difference of opinion there may be respecting the necessity for notice of the purpose to resell, it seems quite unanimously agreed that notice of the time and place of the sale is not required, though, when practicable, the giving of such a notice would be safe and proper."

2. Resale Must Be Made Within Reasonable Time.

The sale in the case at bar was consummated within a reasonable time. The evidence proves that at the time defendant breached the contract the country at large was suffering a great deflation of prices and that markets were entirely upset. This is referred to by Judge Bourquin as "historical deflation." (Tr., p. 29.) It appears from the evidence of both parties that there was no market immediately after the breach of the contract; and plaintiff sold the defendant's apples before it consummated a single sale of its own.

It has been held that where the market is depressed five months is not an unreasonable time.

> *Frederick* v. *American Sugar Refining Co.,* 281 Fed. 305 (supra).

Nine months has been held not an unreasonable time in the case of *Carlisle Packing Co.* v. *Deming,* 62 Wash. 455, 114 Pac. 172 (supra) (1921).

In *Peck* v. *Co.,* 131 La. 177, 59 So. 113 (La.), referred to by Judge Bourquin's opinion, a delay of two years was held not unreasonable.

3. The Goods Must Be Sold at the Market of the Place of Delivery or the Nearest Available Market.

Discussion of this question is unnecessary, as the evidence shows conclusively that there was no market at the place of delivery, and that the plaintiff used great diligence and much effort in attempting to sell the goods before an actual sale was made.

The following cases hold that if no market exists the plaintiff may sell the goods to any purchaser at any location.

*Frederick* v. *Am. Sugar Refining Co.,* 281 Fed. 305 (supra);

*Lillie* v. *Weyl Zuckerman Co.,* 45 Cal. App. 607, 188 Pac. 619 (1920);

*Carlisle Packing Co.* v. *Deming,* 62 Wash. 455, 114 Pac. 172 (1921).

Williston on Sales, p. 969:

> "If there is no market value from which the goods can be sold, it is impossible to lay down a narrower principle than that the plaintiff is entitled to the full amount of the damage which they have really sustained by a breach of the contract."

24 R. C. L. Sec. 390, at page 121:

> "Where the character of the commodity or article sold is such that there is no general market for it at or near the place of delivery, or where there is no general purchaser for the same except the buyer, it is necessary that some other criterion be taken than the difference between the agreed price and the general market value, and in such a case it has been held that the seller is entitled to recover the difference between the agreed price and the price at which he is compelled to resell."

## SUMMARY.

In summarizing as to the measure of damages in this case, we repeat that where the plaintiff has elected to sell the goods on the buyer's behalf, the damage is the difference between the contract price and the re-

sale price where such resale has been fairly and honestly made. The rule is succinctly stated in

> *Habeler* v. *Rogers,* 131 Fed. 43 (Circuit Court of Appeals, Second Circuit, 1904), at page 45:
>
> "The law applicable to actions for a breach of contract of sale of goods is so familiar that it almost seems superfluous to repeat the settled rules which obtain. Upon a breach by the vendee the vendor is at liberty to fully perform upon his own part, and, when he has done all that is necessary to effect a delivery of the goods, so as to pass the title to the vendee, he may store or retain them for the vendee, or give the vendee notice and resell them. If he pursues the former course, he is entitled to maintain an action for the contract price of the goods. If he pursues the latter, his recovery will be the difference between that price and the net proceeds of the resale. But it is not obligatory upon him to adopt either of these courses, and, if he does not care to do so, he is entitled to recover the difference between the contract price and the market price or value at the time and place of delivery fixed by the contract. Where a vendee explicitly refuses to perform his part of an executory contract before the time for performance by the vendor has arrived, no tender of performance on the part of the latter is necessary to entitle him to recover damages for the breach."

The plaintiff in error has failed to appreciate the importance of the fact that the seller may so elect his remedies and consequently has failed to distinguish between cases in which the seller has so elected to sell goods in behalf of the buyer and those cases where no such sale has been made. Many of the cases cited in its brief are of the latter class.

The authorities upon the right of resale in cases of this character, the method of making the same and the effect of such sale, are reviewed in a note found in 42 Lawyers' Reports Anno., (N. S.) at page 683, referred to in Judge Bourquin's opinion.

D—No Anticipatory Breach in the Case at Bar.

In the discussion by plaintiff in error of the measure of damages it is claimed that "the contract was kept alive for the benefit of both parties until the 31st day of January, 1920, the date agreed upon for delivery"; and it is argued that there was an *anticipatory* breach of an executory contract of sale on January 23, 1920. It is submitted that this is a misconception of the facts and the law here involved, and that the question of anticipatory breach of an executory contract does not arise in the case at bar. The contract upon which suit was brought, provided for shipment in December of 1919, or January, 1920, at the seller's option. The seller exercised this option on January 13, 1920, by notifying the defendant of its readiness to ship the apples and requesting shipping instructions. This was an offer by plaintiff of full performance of the contract at the time therein designated. The complete breach of the contract by defendant therefore occurred on January 23, 1920, after plaintiff's offer to fully perform. This was in no sense an anticipatory breach but was a refusal by the defendant to carry out the terms of its contract upon offer of the plaintiff to fully perform. It was a final refusal and breach of the contract on January 23rd, to the same extent as if the offer or the refusal or both had occurred on January

31, 1920. For the reasons above stated, we make no further comment upon the discussion contained in the brief of plaintiff in error as to the rules of law applying to an anticipatory breach of an executory contract of sale.

## III.

## THE PLAINTIFF OFFERED TO DELIVER TO DEFENDANT AND SUBSEQUENTLY SOLD THE GRADE AND QUALITY OF APPLES CONTRACTED FOR BY DEFENDANT.

The fourth point discussed by plaintiff in error in its brief, pages 48 to 50, seems to be based upon the lack of proof that the contract could not have been filled with "choice" evaporated apples at 18½c instead of "extra choice" at 19c. It is claimed that the offer of plaintiff to fulfill the contract did not comply with its terms. To this argument there are several answers:

1. The tender from plaintiff to defendant, on January 13, 1920 (Plaintiff's Ex. No. 1, Tr., p. 33), was of "the car of dried apples ordered from us." There was no designation of "choice" or "extra choice" in this tender. The letter closed, however, with a request to the defendant to inspect the apples at time of loading if the defendant did not wish to "accept our grades", thus implying that the apples might be any of the grades specified in the contract.

The breach of the contract by the defendant on January 23, 1920 (Plaintiff's Ex. No. 7, Tr., p. 37),

occurred three days after the sample of the apples was ordered forwarded. (Plaintiff's Ex. No. 5, Tr., p. 36). Its only objection to the sample so received was that plaintiff was tendering Wenatchee instead of Yakima stock. As heretofore stated the contract did not mention Yakima stock.

The breach of the contract by defendant in refusing to accept delivery of the car of apples tendered relieved the plaintiff, at its option, from any other tender under the contract of further performance on its part. Upon an unconditional breach by one party to a contract, the obligations as to performance on the part of the other cease.

> *Roehm* v. *Horst,* 178 U. S. 1, 44 L. Ed. 953; California Civil Code, Sec. 1440.

2. As above stated, the objection by defendant to the tender, and the resulting breach of the contract, was based entirely upon the alleged tender of Wenatchee stock in place of Yakima stock. This is shown both by the telegram of January 23rd (Plaintiff's Ex. No. 7) and the letter of January 24th (Plaintiff's Ex. No. 8, Tr., pp. 37-38). Defendant's objection upon this one ground was a waiver of any other objection to the tender which it might have then made. Having rested its rejection upon that single ground, it could not later avail itself of any other reason for its action. The law upon this point is clearly stated by the Supreme Court in the case of *The Ohio & Mississippi Railway Company* v. *McCarthy,* 6 Otto (96 U. S.) 258-268, 24 L. Ed. 693-698.

In that case, a railroad company excused its failure to ship certain cattle upon the ground that it did not

have sufficient cars to make shipment. When suit was brought, it attempted to defend upon the further ground that the shipment was requested upon Sunday which, under the law in West Virginia, where shipment was to be made, was illegal. After holding that the latter point was an afterthought, suggested by the pressure and exigencies of the case, the Supreme Court say (P. 268 Official Edition, p. 696 L. Ed.):

> "Where a party gives a reason for his conduct and decision touching anything involved in a controversy, he cannot, after litigation has begun, change his ground, and put his conduct upon another and a different consideration. He is not permitted thus to mend his hold. He is estopped from doing it by a settled principle of law." (Citing cases.)

The above pronouncement of the Supreme Court is quoted with approval in the decision by Judge Ross in the Circuit Court of Appeals of this Circuit, and the citation of many cases to the same effect is added in the case of *Polson Logging Co.* v. *Neumeyer*, 229 Fed. 705-708 (Ninth Circuit).

In that case it is held that the purchaser had valid objections to the acceptance of certain steel bars for the reason that the length and weight did not correspond with the terms of the contract, and if refusal had been seasonably made upon those grounds, the purchaser would have been justified in such refusal, "but," say the Court, "the case shows that the purchaser refused to receive the steel so shipped solely upon the grounds that the seller's solicitor was guilty of fraud in procuring the order and that the defendant's employee was without authority to give it, and

therefore that there was no sale or purchase." The objections made at the trial to defeat the action were not made until shortly before the trial, although they might have been successfully made, if raised in time. To that state of facts, this court applied the rule of the case of *Ohio & Mississippi Railway Company* v. *McCarthy,* above cited.

If the defendant ever had any valid objections to the tender of "extra choice" instead of "choice" apples, the above cited cases are exact authority that such objection was waived. The language of the Supreme Court is again quoted with approval by Judge Knapp in a decision of the Circuit Court of Appeals of the Fourth Circuit in the case of

*Wall Grocery Co.* v. *Jobbers' Overall Company,* 264 Fed. 71-74. (Fourth Circuit.)

In that case the defense sought to be made upon the trial was based upon the failure of plaintiff to furnish specifications for certain overalls covered by the contract. In the correspondence, however, the plaintiff did not assign any such reason for refusing performance, but relied solely upon the proposition that it had never "confirmed the order." The Court say: "Plainly, as we think, defendant cannot now shift its claim for the purpose of evading liability," and then quotes the language of the Supreme Court in the McCarthy case.

The same rule is laid down by the District Court of New York in

*Robertson* v. *Garvan,* 270 Fed. 643-649. (Second Circuit.)

In that case, objection was made at the trial that the

seller breached the contract by failing to ship the ore "in as near as possible equal weekly quantities." At the time of the breach, the objection was based solely on a certain vis major clause in the contract. It was held that it was too late to claim a breach of the contract upon any ground other than the one urged at the time of the breach. As shown by the citations in Judge Ross' opinion above referred to, the rule here contended for is one of general application in both Federal and State Courts, including the Supreme Court of California.

In its argument upon this branch of the case, the plaintiff in error, in its brief, at page 49 says:

> "As long as 'choice' evaporated apples were available in the market the defendant had a *right to insist* upon the delivery of that particular grade." (Italics ours.)

The fault of the argument is that defendant did not so insist but waived any right which it might have had in that regard.

3. The proper construction of the contract sued upon does not imply that the order could be filled with "extra choice" apples only in the event that it was physically impossible for the seller to obtain "choice" apples. The clause, "with provision that seller may be privileged to substitute grades, provided cannot fill order with grade ordered, 'extra choice' 19¢, 'fancy' 19¾¢," was evidently intended by the parties to confer upon the seller the option of furnishing apples of any of the three qualities named at the prices quoted. The contract was so interpreted by the plaintiff. Its president testified: "The contract gave

us the privilege of filling the order with either choice or extra choice or fancy; we elected to fill it with extra choice." (Tr., p. 52.) Defendant's attention was called to the matter of grading by the plaintiff's letter of January 13th. (Plaintiff's Ex. No. 1, Tr., p. 33.) The letter of March 6th also indicates that the plaintiff interpreted the contract as giving it an election. (Defendant's Exhibit "D," Tr., p. 57.) Evidently the contract was interpreted in like manner by the defendant, for in none of the correspondence either before or after the breach is there any suggestion that the tender of "extra choice" apples at 19 cents was not a performance by plaintiff of the terms of the contract. On January 28th, plaintiff advised defendant that the car tendered was "extra choice" apples. Defendant made no objection upon that ground, notwithstanding that these identical apples were warehoused for the defendant, and draft for the contract price at 19 cents, with warehouse receipt attached, forwarded by plaintiff to defendant on March 6th. Again on September 25, 1920, the plaintiff advised the defendant of the sale of this identical car of apples and in its invoice, enclosed with such letter, referred to 1200 boxes "extra choice" evaporated apples. (Tr., pp. 45-46.) Defendant, therefore, had notice from January 28, 1920, to the date of the trial that the apples tendered were "extra choice" and made no objection thereto. To that situation the language of the Supreme Court in the McCarthy case is very pertinent: "This point was an afterthought, suggested by the pressure and exigencies of the case."

It is respectfully submitted that this case was correctly decided by Judge Bourquin in the District Court; that no error appears in the record; and that the judgment should be affirmed.

HAVEN, ATHEARN, CHANDLER & FARMER,
*Attorneys for Defendant in Error.*

No. 4056

IN THE

# United States Circuit Court of Appeals

## For the Ninth Circuit

RUTH HAZELTON,

*Plaintiff in Error,*

vs.

UNITED STATES OF AMERICA,

*Defendant in Error.*

# Transcript of the Record

*Upon Writ of Error from the United States District Court for the District of Idaho, Central Division.*

CAPITAL NEWS PUBLISHING CO., BOISE

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*In the District Court of the United States, in and for the District of Idaho, Central Division.*

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UNITED STATES OF AMERICA,

*Plaintiff,*

vs.

RUTH HAZELTON,

*Defendant.*

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No. 1816.

AFFIDAVIT.

United States of America, )
District of Idaho, ) ss.
Cental Division. )

C. B. Steunenberg, being first duly sworn on his oath, deposes and says: That he is a Federal Prohibition Agent for the District of Idaho, and as such Prohibition Agent makes this affidavit; that on or about the 6th day of November, A. D. 1922, at Lewiston, Nez Perce County, Idaho, Ruth Hazelton, did, then and there wilfully, knowingly and unlawfully, sell a quantity of intoxicating liquor containing more than one-half of one per cent of alcohol, to-wit, one pint of a certain spirituous liquor commonly known as "moonshine whiskey", the same being designed, intended and fit for use as a beverage.

C. B. STEUNENBERG,

Subscribed and sworn to before me this 20th day of December, A. D., 1922.

(SEAL) W. D. McREYNOLDS,
*Clerk of the U. S. District Court.*
By Pearl E. Zanger,
*Deputy.*

Endorsed, Filed Dec. 27, 1922.
W. D. McREYNOLDS, Clerk,
By Pearl E. Zanger, Deputy.

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(Title of Court and Cause.)

Information.

No. 1816.

E. G. DAVIS, United States Attorney for the District of Idaho, who for the United States in this behalf prosecutes in his own proper person comes into Court on this 27th day of December, 1922, and with leave of the Court first had and obtained upon his official oath gives the Court here to understand and to be informed as follows:

COUNT ONE

(Possession)

That Ruth Hazelton, late of the County of Nez Perce, State of Idaho, heretfore, to-wit: on or about the 6th day of November, 1922, at Lewiston, Idaho, in the said County of Nez Perce, in the Central Division of the District of Idaho and within the jurisdiction of this Court, did then and there wilfully, knowingly and unlawfully have in her possession certain intoxicating liquor containing more than one-half of one per cent of alcohol, to-wit, one pint of a certain spirituous liquor commonly known as "moonshine whiskey", the same being designed, intended and fit for use as a beverage, the possession of same being then and there prohibited and unlawful and contrary to the form of the statute in

such cases made and provided, and against the peace and dignity of the United States of America.

COUNT TWO

(Sale)

That Ruth Hazelton, late of the County of Nez Perce, State of Idaho, heretofore, to-wit: on or about the 6th day of November, 1922, at Lewiston, Idaho, in the said County of Nez Perce, in the Central Division of the District of Idaho and within the jurisdiction of this Court, did then and there wilfully, knowingly and unlawfully, sell a quantity of intoxicating liquor containing more than one-half of one per cent of alcohol, to-wit, one pint of a certain spirituous liquor, commonly known as "moonshine whiskey", the same being designed, intended and fit for use as a beverage, the sale of same being then and there prohibited and unlawful and contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

COUNT THREE

(Nuisance)

That Ruth Hazelton, late of the County of Nez Perce, State of Idaho, heretofore, to-wit: between June 1, 1922, and December 1, 1922, at Lewiston, Idaho, in the said County of Nez Perce, in the Central Division of the District of Idaho and within the jurisdiction of this Court, did then and there, wilfully, knowingly and unlawfully, maintain, keep

and operate the Central Hotel located on Lot 3 of Block 30 in the said city of Lewiston, Nez Perce County, Idaho, as a public and a common nuisance, as a place wherein intoxicating liquors containing more than one-half of one per cent of alcohol, to-wit, certain spirituous liquors, commonly known as "moonshine whiskey", the same being designed, intended and fit for use as a beverage, were sold, kept and bartered, said acts and things herein charged being then and there prohibited and unlawful; and contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

E. G. DAVIS,
*United States Attorney for the District of Idaho.*

Upon the affidavit of C. B. Steunenberg, presented herewith, leave is hereby granted to file the foregoing Information.

Let process issue and a bond be fixed in the sum of $500.

FRANK S. DIETRICH,
*District Judge.*

Endorsed, Filed Dec. 27, 1922.
W. D. McREYNOLDS, Clerk.
By Pearl E. Zanger, Deputy.

(Title of Court and Cause.)

No. 1816.

BILL OF EXCEPTIONS.

BE IT REMEMBERED, this cause came on to be heard before Hon. Frank S. Dietrich, District Judge presiding, in the above entitled court, whereupon the following proceedings were had:

*In the District Court of the United States for the District of Idaho, Central Division.*

UNITED STATES OF AMERICA,
*Plaintiff,*

vs.

RUTH HAZELTON,
*Defendant.*

---

J. H. McEvers, Esq., Assistant U. S. Attorney, and McKeen F. Morrow, Esq., Assistand U. S. Attorney,
*For Plaintiff.*

Miles S. Johnson, Esq., and T. B. West, Esq.,
*For Defendant.*

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This cause came on for trial at 9:30 A. M., Tuesday, May 22, 1923, before Hon. Frank S. Dietrich, Judge of the above-entitled court, whereupon a jury was selected and sworn, and the following proceedings were then had:

MR. McEVERS: If the Court please, and gentlemen of the jury, the defendant in this case, Ruth

Hazelton, is charged in the first count with the unlawful possession of intoxicating liquor, to-wit, one pint of moonshine whiskey, on or about the 6th day of November, 1922, at Lewiston, Idaho. And in the second count it is charged that at the same time and place she sold that one pint of moonshine whiskey.

In the third count it is charged that between June 1st, 1922, and December 1, 1922, she maintained, kept, and operated the Central Hotel, located on Lot 3 of Block 30, in the City of Lewiston, Nez Perce County, Idaho, as a public and common nuisance, that is, as a place where moonshine whiskey was kept, sold, and bartered, and other intoxicating liquor, contrary to law, to which information the defendant has entered her plea of not guilty.

I will call Mr. Marler.

MR. JOHNSON: For the purpose of making the record, if Your Honor please: Counsel in reading the information stated that she was charged with having one pint of liquor, in the first count, and in the second count charged with having sold the same pint. Therefore we make a motion to require the Government to elect.

THE COURT: The motion is denied.

FRANK M. MARLER, produced as a witness on behalf of plaintiff, being first duly sworn, testified as follows:

DIRECT EXAMINATION.

By MR. McEVERS:

Q. Will you state your name?

A. Frank M. Marler.

Q. Where do you live?

A. Lewiston, Idaho.

Q. What is your business?

A. Federal Prohibition Agent.

Q. How long have you occupied that position?

A. About a year and a half.

Q. Were you down in Lewiston last year?

A. I was, yes.

Q. I will ask you whether or not you, on or about the 6th of November, 1922, saw the defendant, Ruth Hazelton?

A. I did.

Q. And where?

A. At the Central Hotel, Lewiston.

Q. Just relate the circumstances under which you saw her.

A. On the 6th day of November I went to the Central Hotel for the purpose of purchasing a pint of liquor. I had been there previous and purchased from another lady there, and when I went there this time Mrs. Hazelton was there. The other lady introduced me as one of the customers and told Mrs. Hazelton I wanted to get a pint of liquor. Mrs. Hazelton left the room and went into another room, and presently returned and handed to me the bottle. I gave her a five dollar bill, and she went to

the other lady and got change, and returned to m the change. I put the bottle in my pocket, and talked a little while, and left.

Q. Handing you Government's Exhibit 1, this bottle, I will ask you whether or not you have seen that before?

A. I have.

Q. And where did you first see that?

A. I first saw this bottle at the Central Hotel.

Q. And when?

A. November 6, 1922.

Q. Is that the bottle that you say you purchased from Ruth Hazelton?

A. It is.

Q. Did you make an examination of the contents of that bottle at the time you purchased it?

A. I did.

Q. What examination did you make?

A. By tasting and smelling it.

Q. I will ask you whether or not at that time you had ever had any experience in tasting and smelling of the beverage ordinarily known as moonshine whiskey?

A. I had.

Q. Had that been very often?

A. Yes.

Q. Were you able to tell it when you tasted it or smelled it?

A. I was and am.

Q. What was this at the time you got it?

A. Moonshine whiskey, I would say.

Q. Do you know whether or not that is intoxicating?

A. It is.

Q. And is it ordinarily used as a beverage?

A. It is, yes.

Q. What did you do with that after you got it?

A. Placed it in my pocket and took it up to my house and labeled it.

Q. Then what did you do with it?

A. Locked it in my trunk for a while, and later brought it to Moscow and locked it here in the marshal's office.

Q. In the vault up there?

A. Yes, sir.

Q. I will ask you whether or not the contents of it is the same as when you received it from Ruth Hazelton?

A. It is.

Q. Did you get that out of the vault this morning.

A. I did.

MR. McEVERS: I offer in evidence at this time Government's Exhibit 1, consisting of this pint of moonshine whiskey.

MR. JOHNSON: I would like to ask the witness a few questions.

By MR. JOHNSON:

Q. When did you place this label?

A. On the day that I purchased it.

Q. Who was this "Babe Jane Doe"? Was that put on there at the same time?

A. It was, yes.

MR. McEVERS: It is admitted, then, if the Court please?

THE COURT: Yes.

Q. (By MR. McEVERS): What do you mean by "Babe Jane Doe"?

A. That was the other lady that was there at the time. I don't know her name, didn't know her name or the defendant's name at that time, the exact name.

Q. Did you find out afterwards the name of this "Babe Jane Doe"?

A. Yes.

Q. What was it?

A. The name, I understand, is Joyce Black.

Q. Do you know who was operating the place, or did you have any conversation with the defendant as to who was operating the place there at the time you were up there?

A. At that time a statement was made to me that she had just returned from a vacation and was taking the place back that day, just got back and was taking charge.

Q. She had said that?

A. Yes.

MR. McEVERS: You may inquire.

CROSS EXAMINATION.

By MR. JOHNSON:

Q. When did you go to the Central Hotel first? When were you first up to the Central Hotel?

A. I don't exactly recall the exact date, some time in October.

Q. And you say this "Babe" is known as Joyce Black?

A. I have learned later, yes.

Q. You had purchased liquor from her?

A. I had.

Q. Mrs. Hazelton was not there at that time?

A. Not at the first purchase, no, sir.

Q. And when was the first time you ever saw Mrs. Hazelton?

A. November 6th.

Q. At this time related in identifying the bottle?

A. Yes.

Q. Now, when did you next see Mrs. Hazelton?

A. Why, I don't recall. I have seen her on the street once in a while, I think, after that.

Q. Now, prior to the time you were up there you were not conscious of ever having seen Mrs. Hazelton before?

A. Prior to the 6th?

Q. Prior to the 6th.

A. No.

Q. You asked this Babe Joyce or Joyce Black for a pint of liquor, did you?

A. I did.

Q. Had you bought any liquor of her in bottles before?

A. No, I hadn't.

Q. How did you get it from her before ?

A. By the drink.

Q. What was the purpose in going up there the last time?

A. To secure a bottle.

Q. As an exhibit?

A. Yes.

Q. And you asked Babe Black for liquor?

A. I did.

Q. And you say you gave five dollars, that is, you produced a five dollar bill?

A. Not at the time I asked for it, no.

Q. Well, when the liquor was brought to you?

A. Yes.

Q. Now who gave you the dollar and a half change?

A. Mrs. Hazelton.

Q. Are you sure of that?

A. I am.

Q. You remember of testifying, do you not, before the United States Commissioner at Lewiston, at the time of the preliminary hearing?

A. I do.

Q. Do you recall stating or testifying that she took the bill to Miss Black, and Miss Black gave her the dollar and a half. I don't exactly recall

which gave me the dollar and a half. I will ask you if you didn't so testify at the preliminary examination?

A. I didn't exactly recall at that moment.

Q. Didn't you so testify at that time?

A. Yes, I did.

Q. Now this bottle that you brought here was brought up here by you in the case of the Government against Joyce Black, was it not?

A. Well, I brought it up long before the case was—before that case was supposed to come up.

Q. I understand, but you came up here after getting that bottle, and swore to a complaint charging Joyce Black with having made the sale to you, did you not?

MR. McEVERS: I object to it on the ground that it is immaterial. They might both of them be guilty.

THE COURT: Yes. I don't think this would be the best evidence, Mr. Johnson. If there was any complaint made it ought to be produced. I don't know that it is material. It might be remotely so.

MR. JOHNSON: Have you got a copy of the complaint—

MR. McEVERS: Against Black?

THE COURT: If there was any complaint filed in the Court, I suppose it is here.

MR. JOHNSON: Well, the clerk doesn't seem to be around.

THE COURT: Call the Clerk, Mr. Bailiff.

Q. (By MR. JOHNSON) What time of day was it you were up at the Central Hotel?

A. Why ,as near as I can recall, somewheres around the noon hour, I believe, somewhere about there.

Q. Was it before or after the noon hour?

A. I wouldn't—I couldn't exactly say the exact hour, but somewheres around there.

Q. Do you recall seeing a colored maid there at the hotel at the time you were there?

A. I believe so, yes.

Q. Now, where is this room located where the liquor was purchased?

A. It is in the front of the building, to the front, facing the street.

Q. How much more liquor was there in that bottle at the time you purchased it?

A. Very little more.

Q. How much of it did you drink?

A. Just a taste of it.

Q. Mr. Marler, when was it that you brought this bottle to Moscow, how many days after you had—

A. Oh, I don't exactly recall.

Q. Mr. Marler, I will show you this affidavit. Is that your signature?

A. Yes.

Q. On the 6th day of June, I mean of November, that is the date, that is the correct date, is it?

A. Yes, sir.

Q. That was sworn to before Mr. O'Neil?

A. Yes.

Q. Did you file, make any affidavit against Ruth Hazelton when you filed this?

A. Not at that—

MR. McEVERS: I object to that as immaterial.

THE COURT: Sustained.

MR. JOHNSON: This is the affidavit, if Your Honor please, which was presented in order to get an information filed against Babe Joyce. On the same identical sale he claims that—

THE COURT: No. Proceed with your evidence.

MR. JOHNSON: Well, pardon me. I didn't catch the ruling.

THE COURT: Objection sustained.

MR. JOHNSON: In order to make the record, we offer in evidence now the affidavit. Will you mark that, please, for identification?

Said affidavit was marked—

DEFENDANT'S EXHIBIT NO. 1.

MR. JOHNSON: We now offer in evidence Defendant's Exhibit No. 1, for identification.

MR. McEVERS: We object to it on the ground that it is immaterial and irrelevant. If the facts as stated by the witness are true, obviously both those parties would be guilty.

THE COURT: Sustained. I am sustaining the objection upon the ground that if what the witness has now stated on the witness stand is true, each

and both of these women would be guilty of violating the prohibition act, and they might be proceeded against jointly or severally.

MR. JOHNSON: So that the Court may understand our position, it is that this witness never made any complaint against Joyce Black—I mean against the defendant, until several months afterwards, and then it wasn't by his instrumentality; it was by somebody else's.

THE COURT: Well, there is no evidence of that. The jury will not consider the statement as a statement of fact.

MR. JOHNSON: That was the purpose of the inquiry along that line to develop that fact.

THE COURT: Well, you can inquire when this complaint was made, if you desire, and what report the witness here made of the facts, and see whether there is any inconsistency. You may show any inconsistency of statement on his part, if there is any, but, as I have already suggested, there is no inconsistency between his complaint against this other woman and the complaint against the woman now on trial.

Q. (By MR. JOHNSON) Mr. Marler, you make your report to the United States Attorney or to the head of your department, as to these various investigations of yours?

A. I do.

Q. When did you first report anything in con-

nection with the defendant, Ruth Hazelton, what date?

A. I don't recall the exact date now, not having my report with me.

THE COURT: Have you any memoranda by which you could verify or refresh your memory?

A. Yes, I have a copy of my case report.

MR. McEVERS: Have you got it with you?

A. I have it upstairs.

Q. (By MR. JHONSON.) Approximately can you give the date? Do you recall whether it was about the latter part of December or the first of January before you ever made a report against Ruth Hazelton?

A. I don't recall the date at all. I haven't anything in my mind that tends to recall the date.

Q. Did you make any report?

A. I did.

Q. Of this affair against Ruth Razelton until over a month after the date alleged there?

A. It was something like that later, yes.

Q. So there was no report made by you to anyone that Mrs. Hazelton had sold you any liquor for over a month until after this transaction?

A. Yes, that is true.

THE COURT: Well, the question is, did you make a separate report with regard to this affair, or did you report the entire transaction at the time, against both women?

A. I made two separate reports.

THE COURT: And you have both of those reports here?

A. No; I have only the Ruth Hazelton report here. Yes, I might have the other in my file. I have my file upstairs. They are all in there.

Q. (By MR. JOHNSON) As I understand you, you made no report charging Mrs. Hazelton with any sale to you of any liquor until over a month after you had reported this transaction as to Babe Joyce?

A. That is correct.

Q. Now when was the next time, when was the first time you recall seeing Mrs. Hazelton after the purchase of this liquor in the Central Hotel?

A. Well, definitely recalling, the time of the arraignment before the commissioner. I had seen her before that time on the street.

Q. Do you recall approrimately the date of that preliminary?

A. No, I do not.

MR. JOHNSON: Does your record show, Mr. McEvers? Have you got anything there to show that?

MR. McEVERS: In the Hazelton case?

MR. JOHNSON: Yes.

MR. McEVERS: Yes, I think so. (Handing paper to Mr. Johnson) There is the paper.

Q. (By MR. JOHNSON) The preliminary examination you recall now as being held on the 5th day of December?

A. I don't recall the date. The commissioner's report shows it.

MR. JOHNSON: That is what the commissioner's transcript shows, is it?

MR. JOHNSON: Yes. It shows that the preliminary was held, Your Honor, on the 5th day of December.

THE COURT: And on a complaint filed at what time?

MR. JOHNSON: On a complaint filed—

MR. McEVERS: The first day of December.

THE COURT: The complaint then was filed about twenty-five days after the alleged offense.

MR. JOHNSON: And the complaint charges a different offense, charges that on the 20th day of November, a different date.

Q. (By MR. JOHNSON) I show you a complaint made before Mr. O'Neil. This is your signature, is it, Mr. Marler?

A. Yes.

Q. Did you file more than one complaint against Ruth Hazelton in the lower court?

A. Not that I recall. I filed a complaint, I think only for the issuance of the warrant.

Q. Mr. Marler, I direct your attention to the fact that you charge the crime in that complaint as having occurred on the 20th day of November.

MR. McEVERS: I object to that as incompetent and immaterial. The offense laid there is

charged on the third count. In other words, I haven't finished my case.

THE COURT: That is of maintaining a nuisance?

MR. McEVERS: Yes, if the Court please.

THE COURT: Oh yes; that wouldn't be fair, Mr. Johnson.

MR. JOHNSON: I appreciate that, but this is with reference to the same identical bottle.

MR. McEVERS: Oh, but it is not.

MR. JOHNSON: I propose by my cross examination to show that it is.

MR. McEVERS: All right then. Don't do it that way.

Q. (By MR. JOHNSON) Mr. Marler, you recall being a witness before Mr. O'Neil on the 5th day of December, 1922?

A. Yes.

Q. Do you recall in reference to the fact of being asked about this bottle, and stating that the bottle was at the marshal's office in Moscow?

A. Yes, sir.

Q. You were testifying as to this same identical bottle, were you?

A. Yes, sir.

Q. And that is the only bottle you were testifying as to having bought from Mrs. Hazelton?

A. It is.

Q. And you charged her with having bought

that bottle from her on the 20th day of November, didn't you?

A. I did not.

Q. Doesn't this state the 20th day of November?

A. That was an entirely different transaction.

Q. Have you got any other complaint in this action but that one?

A. That is all that I know of.

Q. Well, in the complaint that she was arrested on, you were a witness, and you testified solely as to that bottle, did you not?

A. I testified to the date I bought this bottle, yes.

Q. The complaint was made on the 20th day of November—

MR. McEVERS: I object to that on the ground that it is improper and incompetent and immaterial.

THE COURT: Sustained.

Q. (By MR. JOHNSON) You didn't charge any other complaint against this woman yourself?

MR. McEVERS: I object to that as repetition.

THE COURT: Sustained.

Q. (By MR. JOHNSON) Do you recall my asking you the question as to whether or not this bottle that is before you in evidence was not taken to Moscow to be used as evidence against Babe or Joyce Black, and you said that it was?

MR. McEVERS: I object to that on the ground that it is immaterial.

THE COURT: Sustained.

Q. (By MR. JOHNSON) You spoke about the fact that at the time you testified you didn't know which one of these women gave you the dollar and a half. Is that correct?

THE COURT: He has answered that once.

Q. (By MR. JOHNSON) When was your mind refreshed as to which gave you the dollar and a half?

A. Later, after I read my case report over.

Q. So the testimony that you are now giving is based upon the reading of a report that you had made to the officers of the government in connection with the case, is that correct?

A. It is.

Q. Now during that day you weren't back there any other time, on the 6th day of November?

A. No, sir, I wasn't.

Q. Was there anyone with you?

A. No.

Q. I think you have already answered this. That is the only bottle you personally ever claim to have bought from Mrs. Hazelton.

A. Yes.

MR. JOHNSON: That is all.

RE-DIRECT EXAMINATION.

By MR. McEVERS.

Q. Mr. Marler, will you just explain now to the jury how it happened that you made a separate case report in the case of Black and Hazelton, and

how you came to file the complaint against Ruth Hazelton on the date that you did?

A. I made my first case report out against Ruth —or Joyce Black, or, as I knew her at that time, "Babe Jane Doe", after I had purchased this bottle jointly from her and Mrs. Hazelton, because I already, before this purchase, had sufficient evidence to make a case out of against Joyce Black, drinks and such that I had bought with another agent before this time.

Q. That was at the Central Hotel?

A. At the Central house. And at the time of the 6th, the first transaction I ever had with Mrs. Hazelton was this purchase made jointly from Mrs. Hazelton and Joyce Black. And at a later date than that I secured affidavits from two gentlemen who stated that they had—

MR. JOHNSON: If Your Honor please, we object to the contents of any affidavits.

MR. McEVERS: He has gone into this, trying to confuse.

MR. JOHNSON: No. You had the Court rule against me, and I accepted the ruling. But we object on this ground, as absolutely hearsay as to what somebody told him, in the absence of the defendant.

THE COURT: Overruled.

A. At a later date I secured the affidavit from two gentlemen, who stated that they had purchased—

MR. JOHNSON: We object on the other ground that the affidavits would be the best evidence.

THE COURT: Well, you need not state the contents of the affidavits. You mean to say that you procured what you regarded as corroborating evidence?

A. I did, yes.

THE COURT: Against this defendant?

A. Yes, sir.

THE COURT: Proceed.

A. Later I procured this corroborative evidence, and on that corroborative evidence I filed a complaint and conducted a preliminary hearing and had her bound over to this Court.

MR. JOHNSON: That is all.

MR. McEVERS: That is all.

MR. JOHNSON: If Your Honor please, may we have an understanding with counsel that all this evidence, whatever it may be, is excepted to? I don't know—it has been some time since I tried a case in the United tSates Court, a criminal case. I was always on the government's side. But I don't care to waste time by excepting all the time.

THE COURT: You will have to take your exceptions here. It wouldn't do any good for you and counsel to agree, because the appellate court would give no attention to it unless you take your exceptions.

W. H. GRASTY, produced as a witness on behalf of plaintiff, being first duly sworn, testified as follows:

DIRECT EXAMINATION.

By MR. McEVERS.

Q. Will you state your name?

A. W. H. Grasty.

Q. Where do you live, Mr. Grasty?

A. Port Orford, Oregon.

Q. What is your business?

A. Working on the highway.

Q. I will ask you whether or not you were in Lewiston on or about the 20th day of November, 1922?

A. I was.

Q. Did you see Ruth Hazelton on that date?

A. I did.

Q. I will ask you whether or not you had any dealings with her on that date concerning intoxicating liquor?

A. Well, on that day I was with another party that took a drink that he bought from Mrs. Hazelton.

Q. Did you see him make that purchase?

A. I did.

Q. Did you have anything to drink there yourself on that day?

A. I took a drink of whiskey that this gentleman purchased.

Q. What kind of liquor was it?

A. I should pronounce it moonshine whiskey.

Q. That is the regular moonshine whiskey that is—

A. I should judge so, yes.

Q. By THE COURT) Where was that?

A. In the Central Hotel, Lewiston, Idaho.

Q. (By MR. McEVERS) Just relate what occurred there at that time. Give us the entire transaction, if you can, as to what was said and done.

A. As near as I remember, I met this genaleman on the street, and I had met him once before, and he just come into town I believe from Pullman or Colfax or somewheres down the line, and I told him I was going up to bed, and he went up to get a room, and we were standing by the stove getting warm, and Ruth Hazelton came out there and she asked me if this gentleman was all right, and I told her as far as I knew he was perfectly all right, and so she proposed that he buy a drink of whiskey, and he said all right. So we went into my room. I had room 6, right next to the stove. And she came in there with a bottle and poured us out a drink each, and he paid for it.

Q. Had you ever purchased any liquor from Ruth Hazelton before that?

A. I had, yes, sir.

Q. There at the Central Hotel?

A. Yes, sir.

Q. Approximately how long before?

A. About three days before.

Q. And what kind of liquor was that?
A. The same kind.
Q. Moonshine whiskey?
A. Yes, sir.
Q. And did you pay for that?
A. I did.
Q. How much.
A. Fifty cents a drink.
MR. McEVERS: You may inquire.

CROSS EXAMINATION.

By MR. JOHNSON.

Q. Who was the gentleman that was with you?
A. I believe his name was Mishler, as near as I can remember. I wouldn't be positive, but that is the way I understood it.
Q. You say Mr. Mishler came up there with you, and Mrs. Hazelton asked him about buying a drink?
A. Yes. sir.
Q. Who was with you when you bought a drink three days before?
A. No one was with me.
Q. You were alone?
A. Yes.
Q. You were asked about this in Lewiston, were you not, by the police?
A. Well, I believe I was, yes, sir.
Q. I will ask you whether or not you didn't state when they asked you if you had bought any liquor of Mrs. Hazelton, that you had not?

THE COURT: No, you needn't answer that. The only purpose of this would be to lay the foundation for impeachment, and of course it isn't sufficient.

Q. (By MR. JOHNSON) Well, you were arrested by the police in Lewiston at what date?

MR. McEVERS: I object to that.

MR. JOHNSON: Just fix the—

THE COURT: Ask him first whether he—

Q. (By MR. JOHNSON) Were you arrested by the police in Lewiston after this transaction?

A. Yes, sir.

Q. About how many days afterwards?

A. About five.

Q. About five days?

A. Yes.

Q. Now I will ask you whether or not on or about the 25th day of November, 1922, at Lewiston, in the police station at Lewiston, you didn't state to Eugene Gasser, the chief of police of the City of Lewiston, that you had not bought any liuor from Mrs. Hazelton, and that she had not sold you any liquor, or given you any liquor. I will ask you if you didn't so state?

A. I think not sir.

Q. And I will ask you if they didn't repeatedly state to you and ask you whether or not Mrs. Hazelton hadn't sold you liquor?

MR. McEVERS: I object to that.

THE COURT: That is immaterial.

Q. (By MR. JOHNSON) I will ask you whether or not it was only after the police made some promises to you in your own case that you state that Mrs. Hazelton had sold you any liquor?

A. I don't remember just when I told them. I believe it was after—They made no promises.

Q. It was after they led you to believe that your interests would be served by testifying against Mrs. Hazelton, was it not?

A. In a way, yes. They never came out and openly asked me that question.

Q. You never stated to them that you had bought any liquor or that she had given you any liquor or that you were present when any liquor was sold—

MR. McEVERS: Objected to on the ground that it is immaterial.

THE COURT: Sustained.

MR. JOHNSON: An exception.

Q. (By MR. JOHNSON) You yourself served a term in the county jail for violation of the liquor law?

THE COURT: No. Upon what theory do you ask that question?

MR. JOHNSON: This is preliminary to the same line of questions I am asking, not for the purpose of impeachment.

THE COURT: It is for the purpose of prejudicing the jury?

MR. JOHNSON: No. It was for the purpose of showing that it was due to the fact that he had been arrested that some promises were made to him provided he would come through and testify against Mrs. Hazelton.

THE COURT: No.

Q. (By MR. JOHNSON) I will ask you whether or not you were not tried, convicted, and sentenced to the Oregon State Penitentiary from Umatilla County for grand larceny, and served a term in the Oregon State Penitentiary for grand larceny?

A. I was, yes, sir.

MR. JOHNSON: That is all.

RE-DIRECT EXAMINATION.

By MR. McEVERS.

Q. When was it that you served this term in the Oregon penitentiary?

A. It was right along in the early nineties, about ninety-one, I believe, if I remember right.

Q. And what was the charge?

A. Larceny.

Q. And what were the facts of the case, briefly?

A. Well, sir, it was moving some property that was mortgaged.

Q. Did you hold a mortgage on that property?

A. No, sir. I was moving it for other parties.

Q. You were an employe?

A. Yes, sir.

Q. And how long had you lived at the hotel—I will ask you whether or not you roomed at the Central Hotel in Lewiston prior to November 20th?

A. I went there on the 16th, if I remember right.

Q. Of November?

A. Yes, sir.

Q. And you were rooming there on the 20th?

A. Yes, sir.

Q. Where were you when you were arrested?

A. I was arrested in room 6, Central Hotel.

Q. Who was this other man that was with you on the 20th?

A. His name was Mishler.

MR. McEVERS: That is all.

RE-CROSS EXAMINATION.

By MR. JOHNSON.

Q. Was anyone rooming with you in room 6?

A. No, sir.

Q. You had the room alone?

A. Yes.

Q. Was it occupied by you exclusively?

A. Exclusively by me, and of course there was times when I took a friend or two up with me, or something of that kind, and that was all.

MR. JOHNSON: That is all.

MR. McEVERS: That is all. Call Mrs. Samuelson.

(Witness excused.)

MRS. SADIE SAMUELSON, produced as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

DIRECT EXAMINATION.

By MR. McEVERS:

Q. Will you state your name?

A. Mrs. Sadie Samuelson.

Q. Are you a Miss or Mrs.?

A. Mrs.

Q. And where do you live now, Mrs. Samuelson?

A. In Spokane, Washington.

Q. I will ask you if you formerly lived in Lewiston?

A. Yes, sir.

Q. When did you live down there?

A. I lived there last fall.

Q. Were you there in November?

A. Yes, sir.

Q. Do you know Ruth Hazelton?

A. Yes, sir.

Q. Have you ever visited or been around the Central Hotel in Lewiston?

A. Yes, sir.

Q. I will ask you whether or not during the fall or the month of October or November, 1922, you saw Ruth Hazelton sell any intoxicating liquor in the Central Hotel in Lewiston?

A. Yes, sir.

Q. About when was the first time that you remember?

A. Well, the first time I was there and had liquor was during fair week.

Q. And what were the transactions then as you remember them?

A. Well, the first night that I went up there was during fair week, and I went up to see her in regard to buying the rooming house from her, and when I went up there there were three gentlemen sitting in a little sitting room, and a friend of mine was there, and she introduced me to the fellows that were there, and they were buying a drink, and asked us to take a drink with them, which we did.

Q. And what was it you got?

A. I think it was moonshine.

Q. When was it you were up there again, if you remember, Mrs. Samuelson?

A. I can't just remember the next time I was up there. I was up there two or three different times.

Q. And was liquor sold on each occasion?

A. Yes, sir.

Q. Do you remember any other specific time?

A. Well, just the night before she went away I was up there and had a drink there.

Q. Did you have any conversation with her concerning her going away?

A. Yes, sir.

Q. Do you know whether or not she left anyone in charge of the building when she went away?

A. Yes, sir.

Q. Who did she leave?

A. She left a girl by the name of Babe; I don't remember her last name.

Q. Did you have any conversation with Mrs. Hazelton concerning whether or not this Babe was her employe?

A. Well, she had taken care of the place for her at one time, and she was going to leave her there in charge of the place while she was gone.

Q. When did she come back, if you know?

A. She came back the 5th day of November.

Q. How do you remember that, Mrs. Samuelson?

A. Well, the way I remember it is because my note was due on the 5th, and I was paying my notes to Mr. Hattabaugh, and he called me up on Saturday and asked me if I remembered my note was due. I told him I did, and he said, "It comes due on Sunday. Do you care to pay it today"? And I said, "No, I am not going to pay it until she comes back, because there is a dispute about my lease, and I wanted it straightened out before I pay any more money," and he said it was all right, and she came back the next day.

Q. It was Saturday you had this conversation?

A. Yes, sir, and she came back Sunday, and she called me up, and I told her I wished she would

come up, and she came up and talked it over, and Monday we went out and the lease was turned over to me, and Tuesday I went up and paid my note.

Q. Have you got that note with you?

A. Yes, sir.

Q. May I see it?

(Witness handed paper to Mr. McEvers.)

Said note was marked—

PLAINTIFF'S EXHIBIT NO. 2.

Q. Handing you for identification Government's Exhibit 2, I will ask you whether or not that is the note? Just look at it. Is that the note you say you had given to Ruth Hazelton?

A. Yes, sir.

Q. This is signed by Bessie Wilson. Whose name is that?

A. That is the name I took when I bought the place from her.

Q. You were going under that name at that time?

A. Yes, sir.

Q. How did it come that you were under that name at that time?

A. I took the name because I had a sister living in Clarkston, and I didn't care that she should know I was in town.

MR. McEVERS: I wish to offer in evidence Government's Exhibit 2. I wish to offer in evidence the date of its making, and the date it was

due, and the date payable, and the names of the parties. Any objection?

Reading from Government's Exhibit 2: Lewiston, Idaho, October 5, 1922. $100. Thirty days after date, without grace, I promise to pay $100 in gold coin, and so on, at maturity, to the order of Ruth Hazelton, and due November 5, 1922. Signed, Bessie Wilson. Marked paid November—I am not certain as to what the date is,—1922.

Q. Do you know what that date is?

A. The 7th.

MR. McEVERS: Paid.

Q. Where are you living now, Mrs. Samuelson?

A. At Spokane, Washington.

Q. To whom did you first talk, if anyone, of the government officers, about this case?

A. The first one I talked to was Mr. Marler.

Q. And when was that?

A. That was last Thursday. He called me over the phone.

Q. I will ask you whether or not you were subpoenaed to come here?

A. I wasn't subpoenaed, but I came here.

Q. You were requested to come, over the phone?

A. Yes, sir.

Q. And had a subpoena served on you when you got here?

A. Yes, sir.

Q. Who requested you to come, over the phone?

A. Mr. Marler.

MR. McEVERS: You may inquire.

CROSS EXAMINATION.

By MR. JOHNSON.

Q. Who did you first tell about buying any liquor?

A. I don't know. I have talked with several people.

Q. Had you ever talked with a government officer about buying anything there?

A. No, sir.

Q. They didn't know anything about your buying any liquor there?

A. No, sir.

Q. What did Mr. Marler say he wanted you for?

A. He said he wanted me as a witness on this Hazelton case.

Q. He didn't know what you were going to testify to?

A. I couldn't say.

Q. You owed some more money besides this to Mrs. Hazelton, didn't you?

A. Yes, there was four other notes to be paid, but I turned the place back to her, and she took it back, and she promised me when she sold the place she would give me back $200 that I had paid for it, and also pay me for some furniture I put in there.

Q. She hasn't done that?

A. She hasn't done that.

Q. You tried to get her to give you back some money you put in there?

MR. McEVERS: I object as immaterial.

THE COURT: I think I will let her answer this question.

A. I didn't try to get her to. I just called her and asked her if she was going to give me the money she promised me, and she said no, and she talked very mean to me over the phone.

Q. I will ask you if you didn't state to her that if she didn't give you that money you would make it hot for her?

A. I did not.

Q. I will ask you if about a week ago you didn't call Mrs. Hazelton and threaten her if she didn't pay you that money?

A. No, sir; I did not.

Q. And didn't you say to her that if she wouldn't pay you that money you would make it hot for her?

A. No, sir; I did not.

Q. I will ask you if you didn't go, after that, and tell some of the officers in reference to what you claim you have now testified to?

A. No, sir; I have not talked to no officers.

Q. Never talked to anyone?

A. No, sir; I did not.

Q. Never talked to Mr. Marler?

A. No, sir.

Q. And he didn't know what you were going to testify to?

A. I was talking to an attorney there.

Q. Did you ask the attorney to inform the officers of the government?

A. No, sir; I did not.

Q. Was it a government attorney?

A. No, sir; not to my knowledge he wasn't.

Q. And when do you say this occurred, this sale of liquor?

THE COURT: Which one?

Q. (By MR. JOHNSON) The first one that you—

A. It was one night during fair week.

Q. Of what year?

A. 1922.

Q. And who was present?

A. Well, there were three gentlemen and a friend was with me.

Q. What were their names?

A. The fellow that was with me was Walter Miller, and the other two fellows was Jake Miller, and one was Fred Frem, and a fellow by the name of Munday, from Waha.

Q. And you claim they were present when Ruth Hazelton sold some liquor, do you?

A. Yes, sir.

Q. Did you drink yourself?

A. Yes, sir.

Q. When was the next time?

A. I can't just remember the date I was up there.

Q. About what time do you think it was?

A. Well, I know it was one night just before she left.

Q. Do you know when she left?

A. I don't just remember the date.

Q. Was it along the fore part of October?

A. Yes, sir.

Q. And it was before that time?

A. I went there and took the place on Thursday, and she left either Monday or Tuesday, I am not positive.

Q. You bought from her the Kendrick rooms?

A. Yes, sir.

Q. And this note was a part of the consideration?

A. Yes, sir.

Q. (By THE COURT) That was another rooming house?

MR. JOHNSON: Another rooming house.

Q. (By MR. JOHNSON) Then this note was paid on the 7th of November?

A. Yes, sir.

Q. Mrs. Hazleton got back, as I understand you, on the 5th?

A. Yes, sir.

Q. And you went with her on the 7th and paid this note?

A. No. I went with her on the 6th out to the landlady and the landlord to have the lease transferred in my name, and on the 7th I went up to

Mr. Hattabaugh and paid him myself. She wasn't with me.

Q. What did you say your name was now?

A. Mrs. Sadie Samuelson.

Q. Did you say you were married?

A. Yes, sir.

Q. What is your husband's name?

A. D. C. Samuelson.

Q. What does he do?

A. He is a machinist.

Q. Where is he living?

A. He is living in Council Bluffs, Iowa.

Q. What are you doing in Spokane now?

A. I am doing chamber work.

Q. Whereabouts?

A. At the Lorraine Hotel.

Q. How long have you been there at Spokane?

A. I have been there since last November.

Q. Did you leave after this time, November?

A. Well, I have been away from there a couple or three different times?

Q. Did you go back after you left?

A. Yes, sir.

Q. You gave up the Kendrick Rooms?

A. Yes, sir.

Q. Do you recall about when that was, Mrs. Samuelson?

A. The 16th day of November.

Q. The 16th day of November?

A. Yes, sir.

Q. And most of the time you have been in Spokane, since?

A. Yes, sir.

Q. How much did you agree to pay for the hotel at the time you gave this note?

A. I agreed to pay $600.

Q. And how much had you paid when you—

A. $200.

Q. Leaving $400 still unpaid.

A. Yes, sir.

Q. And was it the $200 that you had paid that you wanted back?

MR. McEVERS: I object to this as immaterial, and repetition.

THE COURT: Sustained. It is repetition.

Q. (By MR. JOHNSON) Was your husband living with you in Lewiston?

A. No, sir; he was not.

Q. When you left Lewiston who did you go with?

A. I didn't go with anybody.

Q. At the time you signed this note did you know a man that was a cook at the Bollinger Hotel named Wilson?

A. No, sir; there was not.

Q. But in any event that was not your name?

A. No, sir.

Q. That isn't your name, Bessie Wilson?

A. No. sir.

Q. Showing you Plaintiff's Exhibit 2. Who did

you go to Spokane with? I don't know whether I asked you that question or not?

A. You did ask me. I didn't go with anybody; I went with myself.

Q. Was it the first or the second time that you claim you were at the Central Hotel and saw drinks or got drinks that Jake Miller—

A. The first time.

Q. And the second time, was Jake Miller present then?

A. No, sir; he was not.

Q. Who was present the second time?

A. I don't know. There was some man there she said was a painter. I don't remember his name.

Q. Jake Miller is a painter, isn't he?

A. I believe he is, yes.

Q. But there was some other painter?

A. Yes, sir.

Q. Anybody else besides this painter?

A. No.

Q. Did you have a drink then?

A. Yes, sir.

Q. Who gave you the drink?

A. Mrs. Hazelton.

Q. Where was she at the time she gave you the drink,—this man's room?

A. No, sir. She was in the little sitting room.

Q. There was only two times you have testified to being up there and seeing drinks?

A. Yes, sir.

Q. Just twice?

A. Yes.

Q. Have you drank much moonshine whiskey?

A. I have had some, yes.

Q. You know the taste of it then?

A. Yes, sir.

Q. This wasn't Scotch?

A. No, sir.

Q. It was moonshine?

A. Yes, sir.

Q. How many drinks did you have?

A. Well, the first night there was three drinks bought, and the next night there was a couple bought.

Q. Did you drink each time yourself?

A. Yes, sir.

Q. How large a drink did you take?

A. Not a very large one.

A. Half a tumbler full?

A. No.

Q. Well, a quarter of a tumbler full?

A. No.

Q. Well, a whiskey glass full?

A. No, sir.

Q. Did you take any water with the moonshine?

MR. McEVERS: I object to this on the ground that it is immaterial.

THE COURT: Sustained.

MR. JOHNSON: That is all.

MR. McEVERS: Call Mr. Gasser.

EUGENE GASSER, produced as a witness on behalf of plaintiff, being first duly sworn, testified as follows:

DIRECT EXAMINATION.

By MR. McEVERS.

Q. Will you state your name?

A. Eugene Gasser.

Q. Where do you live?

A. Lewiston, Idaho.

Q. And what is your business?

A. Chief of Police.

Q. How long have you occupied that position?

A. About five years.

Q. I will ask you whether or not you in company with members of the sheriff's office made a search of the Central hotel in the fall of 1922?

A. We did.

Q. Do you remember the date?

A. I think it was June 21, 20th or 21st.

Q. June 21st, in the spring of 1922?

A. Yes, sir.

Q. Who was with you at that time?

A. Sheriff Welker.

Q. And did you search for intoxicating liquors?

A. We did.

Q. What did you find?

A. We found about fourteen pints of beer.

Q. Did you make an arrest of the defendant at that time?

A. We did.

MR. McEVERS: I will have marked for identification Government's Exhibit 3.

A certain paper was marked—

PLAINTIFF'S EXHIBIT NO. 3.

Q. Handing you for identification Government's Exhibit 3, I will ask you what that is? If that a record of your—

A. It is our police record.

Q. And is that the charge that was made against Ruth Hazelton at the time you found this beer?

A. Yes, sir.

Q. You took her into police court, did you?

A. Yes, sir.

Q. And what did you charge her with?

MR. JOHNSON: Wait a minute and let me see the record.

Q. (By MR. McEVERS) This will show the charge and the result of that transaction?

A. Yes, sir.

MR. McEVERS: I offer in evidence at this time Government's Exhibit 3.

MR. JOHNSON: Objected to as wholly incompetent, irrelevant and immaterial for any purpose, doesn't tend to prove or disprove any of the allegations.

THE COURT: Sustained.

MR. McEVERS: We offer it, if the Court

please, for the purpose of showing that—I take it it would be material if she was arrested growing out of that transaction. She entered a plea in court.

MR. JOHNSON: This isn't a record of the police court, is it?

MR. McEVERS: Yes.

Q. Is this the record of your police court?

A. Yes, sir.

THE COURT: Let me see it. I thought he said it was, a record of the police office.

MR. McEVERS: Police court, he said.

THE COURT: I am not very familiar with police court records. Is this the only judgment that would be entered?

MR. McEVERS: Maybe Mr. Gasser can tell us.

Q. Is this the record of the police court, Mr. Gasser?

A. Yes, and we have another ledger and transfer it from this into the other book.

Q. But this is the original entry?

A. This is the original, date of the trial and the sentence.

THE COURT: I don't think I will permit this to go in in its present form. It is so very meager, and I notice the charge is not of having liquor.

Q. (By MR. McEVERS) She was arrested at the time you made the search there, was she?

A. Yes.

Q. (By THE COURT) Let me ask you now, when you make an arrest such as in this case do you

file a complaint, or just make an oral charge?

A. We make an arrest in this kind of a case. She was charged with disorderly conduct, and pleaded guilty. That is brought under the—

Q. You don't make a written complaint?

A. No, Your Honor.

Q. You just go in and make a statement, your charge?

A. That is all.

MR. McEVERS: May I ask him a question or two then?

Q. In this particular instance, after you arrested the defendant, did you make such an oral charge?

MR. JOHNSON: We object to this. This, of course, is preliminary, but we object to the witness testifying anything of the kind, as incompetent, irrelevant and immaterial, for any purpose.

THE COURT: Mr. Johnson, I am not quite sure that I understand police court practice, but is it not possible in police court practice to have an oral charge made, or is it necessary to file a written complaint?

MR. JOHNSON: If the police officer should in the first instance discover someone actually in the commission of a crime he could take them into custody, and then a complaint would be filed. This is not a record of the police court; this is a record of the chief of police.

THE COURT: This says police court.

MR. JOHNSON: Well, I know, but this is the chief of police's record.

THE COURT: Is this your own record, or the record of the police judge?

A. This is the police judge's writing and his record.

MR. JOHNSON: Then we object, Your Honor, as not properly identified, and on the other ground, as Your Honor has already ruled, it is another charge entirely.

THE COURT: Counsel is now trying to get an explanation of the charge. I think I will let him answer.

MR. JOHNSON: Save an exception.

Q. (By MR. McEVERS) Did you yourself make an oral charge against her, Mr. Gasser?

A. I charged her on the book with disorderly conduct, on our regular blotter, and the next day we had a trial, and she pled guilty to disorderly conduct, and paid $200 fine, as shown there in the record.

Q. And that grew out of the transaction of the arrest you made.

MR. JOHNSON: We object to that, if the Court please.

THE COURT: Sustained.

MR. McEVERS: You may inquire.

CROSS EXAMINATION.

By MR. JOHNSON.

Q. Mr. Gasser, did you analyze the beer?

A. I did not.

Q. Do you know whether it contained more than one-half of one per cent of alhocol, or any other per cent of alcohol?

A. I couldn't say.

Q. What became of the beer?

A. It was destroyed after the—

Q. Do you know anything about whether it was near beer or real beer, or what it was, of your own knowledge?

A. Of my own knowledge, I probably think it was home brew.

Q. I am asking you if you know.

A. I do not.

Q. You don't know what percentage of alcohol, whether it contained more than one-half of one per cent or not, do you?

A. I do not.

Q. Did you have a search warrant when you went up there?

A. I did.

Q. Where is the search warrant?

MR. McEVERS: Objected to as incompetent, irrelevant, and immaterial.

THE COURT: Sustained.

MR. JOHNSON: Save an exception.

Q. Where did you find what you said was beer?

A. Found it in the ice box.

Q. Now at that time Mrs. Hazelton was around there on a wheel chair, wasn't she?

A. Yes, sir.

Q. I will ask you whether you don't know that she had just had a surgical operation on her feet?

A. She so stated.

Q. She was unable to go to the station at all, wasn't she?

A. She was.

Q. And later she was notified to come down there?

A. Yes, sir.

Q. And she had to be carried down part of the way, did she not?

THE COURT: How is this material, Mr. Johnson? If she got there it is wholly immaterial to us as to whether she walked or rode.

MR. JOHNSON: It is for this purpose, if Your Honor please. It is just to show that the woman was in such condition that she would plead guilty to anything in order to get back. And as far as that was concerned, she wasn't charged with liquor anyway.

THE COURT: Well, let us not take the time—

MR. JOHNSON: At this time we move to strike all of the evidence of the witness as absolutely incomptent, irrelevant and immaterial, and before Your Honor makes a ruling, perhaps it is not necessary, but I have a recent decision of the Cir-

cuit Court of Appeals on the very question.

THE COURT: What question is it?

MR. JOHNSON: On the question with reference to beer, where they have no analysis.

Q. (By THE COURT) Why did you take this liquor, Mr. Gasser?

A. Why, we thought it contained alcohol.

Q. Did you taste it?

A. We tasted it.

Q. You concluded it did contain alcohol?

A. Well, Your Honor, she pleaded guilty to disorderly conduct, and the case was settled that way, without having it analyzed.

Q. You tasted it before you took it down there?

A. Yes, sir; I tasted it. I couldn't say whether it contained liquor or not.

Q. Alcohol or not?

A. Alcohol.

MR. McEVERS: I have another witness who was present with him.

THE COURT: Very well. I will defer action on the motion just made until—

MR. McEVERS: That is all.

MR. JOHNSON: That is all for the present.

MR. McEVERS: That is all, Mr. Gasser. Call Mr. Welker.

(Witness excused.)

GEORGE W. WELKER, produced as a witness on behalf of plaintiff, being first duly sworn, testified as follows:

DIRECT EXAMINATION.

By MR. McEVERS.

Q. Please state your name.

A. George W. Welker.

Q. And you are sheriff—

A. Of Nez Perce County.

Q. You were sheriff in June, 1922, were you not, Mr. Welker?

A. Yes, sir.

Q. And were you with Mr. Gasser on the day you searched the Central Hotel?

A. I was.

Q. What did you find there?

MR. JOHNSON: If the Court please, if this is right along the same line, we object as incompetent, irrelevant, and immaterial.

THE COURT: Overruled.

Q. (By MR. McEVERS) What did you find there?

A. We found some home brew, that is, that is what we pronounced it, in the ice chest.

Q. How much did you find?

A. Well now, I didn't keep check on the bottles, but I should judge a dozen or more bottles.

Q. Did you make an examination of that, Mr. Welker?

A. I just opened a bottle right there, and that was all. There was no test made of it of any kind.

Q. Did you either smell or taste of it?

A. Yes, I smelled and tasted of it.

Q. Are you familiar with the smell and taste of beer?

A. Well, of course we get hold of some of that home brew occasionally. I can't say that I am.

Q. You wouldn't say you were able to examine it and be able to know what it is?

A. Well, it is made in so many different forms by different parties that—but that is what we concluded it was, was home brew.

Q. Do you know how that home brew beer is made?

A. No, I don't.

Q. In a general way?

A. Well, in a general way, well, no, I can't say that I do. I wouldn't know what ingredients to get to make a home brew.

Q. Do you know whether or not it is made by a process involving the fermentation of malt?

A. Yes, I think it is. I think that is—I have been told so. I don't know of my own knowledge what is in it.

Q. Have you ever found any of it in the process of manufacture when search was made?

A. Yes, I have seen it in almost all stages.

Q. Then I will ask you whether or not that you have seen on these searches and raids was made by a process involving fermentation of malt?

MR. JOHNSON: I object, if the Court please as incompetent, irrelevant, and immaterial, and the witness has not shown himself competent to testify.

MR. McEVERS: I think the statute defines a malt liquor or a beer as being intoxicating as a matter of law, a malt liquor as being intoxicating if it contains more than one-half of one per cent alcohol. If it is made by malt in process of fermentation, then it is a malt liquor.

THE COURT: Well, the statute doesn't name malt liquor.

MR. McEVERS—Any spirituous, malt or fermented liquor containing more than one-half of one per cent alcohol.

THE COURT: That isn't my recollection of the statute. It is any kind of liquor containing more than one-half of one per cent. But that would be an immaterial difference perhaps.

MR. McEVERS: Yes, I think it would.

THE COURT: Because you would have to have your one-half of one per cent alcohol anyway.

MR. McEVERS: That is all.

Q. (By THE COURT) You wouldn't be able to say that it contained any alcohol?

A. No, I couldn't say.

MR. JOHNSON: We would like to make the same motion on this one.

THE COURT: Well, if you are through on this matter, the motion will be sustained.

MR. JOHNSON: May we ask the Court to instruct the jury not to consider that evidence?

THE COURT: The jury will not consider that the liquor found in this so-called raid was neces-

sarily intoxicating liquor, that is, there is no proof sufficient to establish what this liquor was or what these bottles contained.

MR. McEVERS: The Government rests.

THE COURT: I think we will take a recess, gentlemen. Gentlemen of the jury, during the recess of the Court be careful not to overhear any discussion of this case or of liquor cases generally. Keep your minds entirely free from outside influences, so that you may decide this case from the evidence as adduced here, and upon nothing else. I think we will take a recess, gentlemen, until one-thirty today instead of two o'clock. Remember the hour—one-thirty.

Accordingly, at 12:10 P. M., a recess was taken until 1:30 P. M. of this date, Tuesday, May 22, 1923.

1:30 P. M., Tuesday, May 22, 1923.

THE COURT: You may proceed, gentlemen.

MR. JOHNSON: Call Mrs. Jones.

MRS. FRANCES JONES, produced as a witness on behalf of defendant, being first duly sworn, testified as follows:

DIRECT EXAMINATION.

By MR. JOHNSON.

Q. State your name.

A. Frances Jones.

Q. Where do you reside, Mrs. Jones?

A. 0227 Seventh Street, Lewiston, Idaho.

Q. About how long have you lived in Lewiston?

A. Pretty near three years.

Q. Are you acquainted with Mrs. Ruth Hazelton, the defendant in this case?

A. I am.

Q. About how long have you known her?

A. I guess about two and a half years, just about.

Q. Do you work for her?

A. Yes, I do.

Q. In what capacity?

A. Maid.

Q. How long have you worked for her?

A. Going on two years and a half.

Q. I direct your attention, Mrs. Jones, to the month of October and the fore part of November of 1922. Do you recall of Mrs. Hazelton having taken a trip east during the month of October, that period of time?

A. Yes.

Q. Who was in charge of the place at the time she left or while she was away?

A. Well, it was a lady that I called "Babe", knew as "Babe".

Q. Do you recall when Mrs. Hazelton returned from the trip east?

A. I think it was on Sunday.

Q. That would be the 5th or 6th of November?

A. Yes.

Q. 1922?

A. Yes.

Q. Of whom does Mrs. Hazelton's family consist, what is her family?

A. A son, as I know it.

Q. And her husband?

A. Yes.

Q. What age is her son?

A. I think he is about 9 or 10, 10 I think.

Q. About what time in the afternoon of Sunday was it that Mrs. Hazelton returned to Lewiston?

A. I wasn't there.

Q. You wasn't there?

A. No.

Q. Well, the next day were you there when Mrs. Hazelton left?

A. Yes.

Q. About what time did she leave?

A. Well, it was after I came to work some time.

Q. Were you informed where she was going?

A. She was going to see her son.

Q. Where was her son?

A. In Colton.

Q. Colton, Washington?

A. Yes.

Q. Who went with her, do you know?

A. No.

Q. Now on the morning, do you recall when she returned?

A. On the morning when she returned?

Q. No, I say do you recall when she returned that morning, on the 6th day of November, do you remember when she returned?

A. I wasn't there.

Q. When do you leave? What is your ordinary employment?

A. Well, I don't have no particular time. When I get through with my work I go.

Q. Well, generally about what time?

A. About 12 o'clock.

Q. Were you in the court room this morning when Mr. Marler, the Federal Agent, was testifying as to having purchased a bottle of liquor up there at the Central Hotel?

A. Yes.

Q. Are you the only colored maid that there is there?

A. Yes.

Q. And I will ask you if you recall the episode as testified to by Mr. Marler, of his being there and purchasing a bottle of liquor from Babe or Joyce Black, and also saying that Mrs. Hazelton was there, do you recall that testimony?

A. Yes.

Q. Was the woman that was there with Babe Black Mrs. Hazelton, the defendant?

A. No.

Q. Who was she?

A. Well, I don't know her name.

Q. Had she been around the hotel for some time?

A. Well, yes, she had been there. She roomed there.

Q. What room was she in, do you recall?

A. Room 5.

Q. And Mrs. Hazelton after she left informing you she was going to Colton, didn't return until after you had left the hotel?

A. No, I didn't see her any more.

Q. What size woman was this woman that was with this Babe or Joyce Black referred to by Mr. Marler?

A. Oh, I guess she was—well, I don't know if she was a little heavier than I am or not, but she had kind of light hair and kind of light complected.

Q. You don't know her name?

A. No, I didn't know her name.

Q. Did you have anything to do with running the hotel, other than act as maid?

A. Well, sometimes I would tell them when someone came.

MR. JOHNSON: Take the witness.

CROSS EXAMINATION.

By MR. McEVERS:

Q. You say you live on Seventh Street in Lewiston?

A. Yes.

MR. JOHNSON: Second Street.

Q. (By MR. McEVERS) Second Street, is it?

A. No, Seventh Street.

Q. You don't live at the Central rooming house?

A. No, I only work there.

Q. What time of the day do you go to work?

A. Well, I go sometimes after nine o'clock and sometimes after that.

Q. And what time do you leave?

A. Well, as I say, I leave sometimes before and sometimes after twelve o'clock, when I get my work done.

Q. You are usually not there in the afternoon then?

A. No.

Q. What time of day was it that Mr. Marler came up there and made this purchase of liquor?

A. Well now, I don't remember seeing Mr. Marler. I don't know anything about him.

Q. You don't remember of ever seeing him there?

A. No, I don't remember Mr. Marler.

Q. Well then, you don't know whether this other woman was there at that time or not?

A. Which other woman?

Q. Whoever she was. As a matter of fact, you don't know anything about that transaction, do you?

A. I know I was there that day.

Q. Just how do you know if you never saw Mr. Marler before?

A. I say I don't remember Mr. Marler. There was so many—I don't remember Mr. Marler.

Q. There was so many purchases of liquor there that you don't know who it was?

A. No, I never said anything about liquor.

Q. How do you identify Mr. Marler as being there at all?

A. I haven't said anything about liquor.

THE COURT: She stated she didn't know whether Mr. Marler was there at all.

MR. McEVERS: That is all.

MR. JOHNSON: Mr. Marler, will you return to the witness stand for a question. I want to recall Mr. Marler for the purpose of a question.

MR. McEVERS: I assume you are recalling him as your witness.

MR. JOHNSON: Absolutely, for the purpose of this question.

FRANK M. MARLER, a witness heretofore duly sworn on behalf of plaintiff, upon being recalled in behalf of defendant, testified as follows:

DIRECT EXAMINATION.

By MR. JOHNSON.

Q. Mr. Marler, do you recall the colored maid coming to the door at the time of this transaction and speaking about some coal?

MR. McEVERS: I object to it as immaterial.

THE COURT: Sustained.

MR. JOHNSON: The purpose is to show that

this did happen, whoever it was. We will show by the witness that she did go and speak to somebody about some coal. That is the purpose of the question. The purpose of the question is to show that this colored maid came to the door and inquired about coal, and then we put the witness on the stand to show that at the time she inquired about the coal Mrs. Hazelton was not there, and that is the time she is testifying to.

MR. McEVERS: Simply trying to get her now to testify to something she refused to when she was on the stand.

MR. JOHNSON: She knows about the coal proposition, and we will show by the witness that the maid did come and ask about coal when he was there.

MR. McEVERS: She didn't so testify.

MR. JOHNSON: Of course she hasn't yet because there was no chance to until I ask him to identify the transaction. We will show by Mr. Marler that this maid did come and speak about the coal.

THE COURT: I know, but that might have occurred—

MR. JOHNSON: No,—at this particular time, if Your Honor please.

THE COURT: Well, he may answer.

Q. (By MR. JOHNSON) Will you state whether or not the maid came there to the door and

spoke about the coal while you were there with these two ladies or these two women?

A. She was in the hall and she come into the room and asked, I think she said, "I will get another bucket of coal and go," or something like that.

MR. JOHNSON: That is all. Now, Mrs. Jones, if you will take the stand again.

(Witness excused.)

MRS. FRANCES JONES, heretofore duly sworn on behalf of defendant, upon being recalled, testified as follows:

DIRECT EXAMINATION.

By MR. JOHNSON.

Q. Directing your attention again, Mrs. Jones, I will ask you if you recall speaking to Babe Joyce—

THE COURT: No, don't lead her.

MR. JOHNSON: Well, that is true.

THE COURT: Yes, it is rather an unusual course you have taken.

MR. JOHNSON: Yes, that is what threw me off.

Q. Will you state what occurred there, if anything, in reference to some coal?

MR. McEVERS: I object until the time and place is laid.

MR. JOHNSON: Well, on the 6th day of November, at the Central Hotel in the front part of the rooms.

MR. McEVERS: I object to that until it is

shown that she knows what occurred on that date. The thing is all away up in the air.

MR. JOHNSON: We can't put in all our evidence at one time. We will show by the witnesses that Mrs. Hazelton didn't get there until the middle part of the afternoon. This woman wasn't there when Mrs. Hazelton returned.

MR. McEVERS: That has nothing to do with the competency of what she is trying to testify to now.

MR. JOHNSON: It identifies the fact that this episode he is talking about was with another woman, not Mrs. Hazelton. She did speak to them about the coal.

MR. McEVERS: I object to counsel testifying.

MR. JOHNSON: I think I can make my position clear. At least I understand that to be the rule.

THE COURT: It is rather strange to me that you didn't ask this woman what occurred, and then you could put Mr. Marler on later. Now you take her off and put him on in her presence, and then call her attention to the particular thing he said.

MR. JOHNSON: This woman don't even know Mr. Marler, and she wasn't paying any attention to Mr. Marler.

THE COURT: No, but you might have asked her what occurred on that day.

MR. JOHNSON: It was just a matter of saving time.

THE COURT: I don't know that it makes very much difference now.

MR. JOHNSON: Well, of course her attention is directed to it now.

WITNESS: Now do you want me to talk?

MR. JOHNSON: If His Honor will permit you to.

THE COURT: What is it you want from her now?

MR. JOHNSON: I want to find out what occurred there at the time.

THE COURT: I thought she already testified to what occurred. If you want her to testify to it again—

MR. JOHNSON: I would like to have her testify to it again, what happened there.

WITNESS: What happened that day?

MR. JOHNSON: Yes?

THE COURT: What day?

MR. JOHNSON: On the morning—

WITNESS: On the 5th—

MR. McEVERS: I object, on the ground that it is highly leading. Every time they get near the situation counsel—

THE COURT: I think I will have to leave it to the jury now, in the light of the circumstances, to give such weight to it as they think it is entitled to, in view of the manner in which it has been

brought out. What day are you talking about, now, Madam?

A. I am talking about on the 5th of November.

MR. McEVERS: Then I object to it on the ground that it is immaterial.

THE COURT: You may state what occurred on the 5th of November.

A. Well, the coal came, and I went to the door and there was someone in there, and this woman Babe,—I don't know her other name, and I don't know the other woman's name, but I know she was in this little sitting room, and I spoke to Babe and told her the coal had come, and Mrs. Hazelton wasn't there.

Q. (By MR. JOHNSON) Now was that on Sunday or Monday?

MR. McEVERS: I object to that as leading.

THE COURT: She may answer.

A. It was on Monday.

MR. McEVERS: What day did you say?

A. Monday.

THE COURT: Monday.

MR. JOHNSON: Take the witness.

CROSS EXAMINATION.

By MR. McEVERS.

Q. Was that on the 5th, the day that Ruth Hazelton first came back?

A. No. She came on Sunday.

MR. McEVERS: That is all.

MR. JOHNSON: It is stipulated and agreed between counsel for the government and the defense that November 5th was Sunday and November 6th was Monday, as shown by the calendar for the year 1922.

Call Mr. Jake Miller.

JAKE MILLER, produced as a witness on behalf of defendant, being first duly sworn, testified as follows:

DIRECT EXAMINATION.

By MR. JOHNSON.

Q. State your name.

A. Jacob Miller.

Q. What is your occupation?

A. Painter and paper hanger and decorator.

Q. Where do you reside, Mr. Miller?

A. Lewiston.

Q. How long have you lived in Lewiston?

A. Twenty-three years.

Q. Are you acquainted with Mrs. Ruth Hazelton?

A. Yes, sir.

Q. Are you acquainted with her place of business?

A. Yes, sir.

Q. Where do you stop in connection with her place of business?

A. I have roomed there since last June.

Q. June of 1922?

A. Yes, sir.

Q. Were you rooming there in October and November of 1922?

A. Yes, sir.

Q. The fore part of November of 1922?

A. Yes, sir.

Q. Were you rooming there at a time when Mrs. Hazelton was away?

A. Yes, sir.

Q. Who was running the place at that time?

A. This Babe Black or Joyce Black, whatever you call her.

Q. Were you in the court room when this Mrs. Jones testified a few moments ago?

A. Yes, sir.

Q. Did you know a woman that occupied room 5?

A. Yes, sir.

Q. Who was she and what was her name?

A. I knew her, her name was Bowler.

Q. How long had she been rooming there, Mr. Miller?

A. Well, I think she had been there probably a week or ten days, something like that; I couldn't say just exactly.

Q. Did you hear the testimony of Mrs. Sadie Samuelson?

A. Yes, sir.

Q. Are you acquainted with her?

A. Yes, sir; to a certain extent.

Q. I didn't hear you.

A. Yes, sir; I have worked for her.

Q. Where did you know her, Mr. Miller?

A. I knew her at the Kendrick rooming house.

Q. Is that the place she referred to as having been purchased by her from Mrs. Hazelton?

A. Yes, sir; that is the same place.

Q. What were you doing there with her?

A. Kalsomining.

Q. These Kendrick rooms?

A. Yes, sir.

Q. When was that that you worked there?

A. That was along in the fore part of November.

Q. How do you fix the time, Mr. Miller?

A. Well, I know because by the way they paid me.

Q. You say "they" paid you. Who do you mean, "they" paid you?

A. Why, this gentleman that was there, Mr.— I don't know what his last name was. They called him "Cookie", that is all I know. He was cook at the Bollinger Hotel.

Q. Well, when was it you were paid?

A. I was to be paid, when I was through I was to have what the material cost, to pay the material bill, which was $21, and I was to have the balance on the 15th of the month. That was his pay day, he told me, and I told him all right.

THE COURT: Let's not go into these matters.

Q. You heard her testimony in reference to the fact that she had secured some drinks and that at one time you were present when there was liquor sold and furnished to her by Mrs. Hazelton, you and others? Did you hear that testimony?

A. Yes, sir.

Q. Were you ever present at the Central Hotel or any other place in the State of Idaho when Mrs. Hazelton furnished this woman or any of the rest of you with intoxicating liquor, either sold it or gave it to you?

A. No, sir.

Q. Did any such thing as that happen?

A. No, sir; not while I was there.

Q. What kind of appearing woman was this that occupied room 5, what sized woman?

A. Oh, I judge she was a woman that would weigh probably 150 pounds, along in there.

Q. What complexion?

A. She was light complexioned.

Q. Now the morning of the 6th day of November—first I will ask you this question: Do you know the date on which Mrs. Hazelton and her husband returned from the trip east?

A. Yes, sir.

Q. What date was it?

A. It was on Sunday, the 5th day of November.

Q. Directing your attention to the morning of the 6th day of November, state what happened in connection with Mrs. Hazelton?

MR. McEVERS: I object, unless he says that he knows.

Q. (By MR. JOHNSON) I am speaking of your own knowledge.

A. I got up on Monday morning, and as I come out they was setting up a stove there, a colored man was setting up a stove. He had a ladder he couldn't reach up to put the stove pipe in, and I told him, "I will get my ladder and help you," and so I went down and got my ten-foot step ladder and put this stove pipe up. And Mrs. Hazelton was ready to go somewhere, and she said, "I will leave it to you to wire that stove pipe up so that it won't fall down and set the house afire," and so I wired up the stove pipe.

Q. What time of day was that?

A. That was between nine and ten o'clock.

Q. Do you know how she left?

A. All I know was, she said—

THE COURT: He says that is all he knows.

A. I don't know how she left. I didn't see her.

Q. Do you know when she returned that day?

A. No, I do not, because I wasn't there.

Q. How long was it after the time you fixed the stove that you saw her again?

A. I saw her that evening when I came home.

Q. How long did you stay around the hotel yourself?

A. I was around there all forenoon practically, in the room and out in the—

Q. Did you see Mr. Marler up there any time during the morning?

A. I did not.

MR. JOHNSON: Take the witness.

CROSS EXAMINATION.

By MR. McEVERS.

Q. You live at the Central Hotel?

A. Yes, sir.

Q. You are very friendly to the defendant, are you not?

A. Always been friendly, yes, sir.

Q. She paid a fine for you very recently, didn't she?

MR. JOHNSON: We object as wholly incompetent, irrelevant and immaterial.

THE COURT: Overruled.

Q. (By MR. McEVERS) Isn't it a fact that very recently you were arrested and fined in Lewiston, and she paid half of that for you, $25?

MR. JOHNSON: An exception.

A. I borrowed the money.

Q. (By MR. McEVERS) Didn't you get the money from Ruth Hazelton?

A. I did not.

Q. How much of your time have you spent in jail the last year?

MR. JOHNSON: We object to this as absolutely incompetent, irrelevant and immaterial.

THE COURT: Sustained.

Q. (By MR. McEVERS) What did you say your business is?

A. Painter and paper hanger and decorator.

Q. Is that all the business that you have?

A. Yes, sir.

MR. McEVERS: That is all.

MR. JOHNSON: That is all, Mr. Miller.

(Witness excused.)

ASA MISHLER, produced as a witness on behalf of defendant, being first duly sworn, testified as follows:

DIRECT EXAMINATION.

By MR. JOHNSON.

Q. What is your name?

A. Asa Mishler.

Q. What is your occupation, Mr. Mishler?

A. Farming.

Q. In November of 1922 where were you living?

A. In Pullman.

Q. Pullman?

A. Yes.

Q. You heard the testimony of one William H. Grasty this morning on the witness stand?

A. Yes, sir.

Q. Did you hear his testimony wherein he stated that you had been with him and you or he had purchased two drinks of moonshine whiskey from Mrs. Hazelton in the Central Hotel in November of 1922, did you hear that testimony?

A. I did.

Q. Did any such thing as that happen?

A. Not that I seen.

Q. Did you purchase any liquor from Mrs. Hazelton?

A. No, sir.

Q. Did you ever purchase any liquor from Mrs. Hazelton?

A. No, sir.

Q. Did you ever see Grasty purchase any liquor from Mrs. Hazelton?

A. No, sir.

Q. Did you ever see anyone purchase any liquor from Mrs. Hazelton?

A. No, sir.

Q. Did you ever see her furnish liquor to anyone?

A. No, sir.

MR. JOHNSON: Take the witness.

CROSS EXAMINATION.

By MR. McEVERS.

Q. Did you live up there at the Central rooms?

A. I went there for a bed along the latter part of November.

Q. So you were up there about the 20th of November?

A. Somewheres along the last part of November.

Q. And you had a room there about that time, did you?

A. Well, not a room. I went up there along between the 16th and Thanksgiving and got a bed there one night.

Q. Did you stay there?

A. Yes, sir.

Q. You saw Mr. Grasty up there?

A. I don't know as I did.

A. Are you sure you didn't?

A. No, I am not sure that I didn't, because there was quite a few men up there when I registered.

Q. You saw Ruth Hazelton there at the time?

A. Well, yes.

Q. Did you see any intoxicating liquor about the place?

A. No, sir.

Q. You didn't have any there yourself?

A. No, sir.

Q. You didn't have a drink at all while you were up there?

A. No, sir.

Q. What is your business now?

A. I am working for Hickey Brothers.

Q. What doing?

A. Taking care of a bunch of ewes and lambs.

Q. Herding sheep?

A. Tending camp.

Q. How long have you been engaged in that employment?

A. I went down there in March, the last part of March, around the 20th.

Q. What were you doing before that?

A. Before that?

Q. Yes.

A. What time?

Q. Well, before that.

A. Well, I was working on the new dormitory.

Q. Where?

A. At Pullman.

Q. You say you didn't see Mr. Grasty up there at the Central rooms?

A. Not that I know of.

Q. Isn't it a fact that you were with him at the time that Grasty was arrested?

A. Me with Grasty When he was arrested?

Q. When Grasty was arrested.

A. No, sir.

Q. Isn't it a fact that you were arrested with Grasty at the same time and you spent all night in jail?

A. Me?

Q. Yes, you.

A. That's news to me.

MR. McEVERS: That's all.

RE-DIRECT EXAMINATION.

By MR. JOHNSON.

Q. Just answer the question. You haven't answered the question. You said that was news to you. Did that or did it not happen? Were you arrested with Grasty?

A. Why, no, sir.

MR. JOHNSON: That is all.

MR. McEVERS: That is all.

MR. JOHNSON: Call Mr. Hazelton.

(Witness excused.)

E. T. HAZELTON, produced as a witness on behalf of defendant, being first duly sworn, testified as follows:

DIRECT EXAMINATION.

By MR. WEST.

Q. State your name, Mr. Hazelton.

A. E. T. Hazelton.

Q. Where do you reside?

A. I have been residing in Lewiston for the last eight months.

Q. Are you the husband of the defendant in this action?

A. I am.

Q. When did you marry?

A. 1917.

Q. Where did you marry?

A. At Missoula, Montana.

Q. How long have you been a resident of Lewiston?

A. Well, it hasn't really been a resident. I have been there off and on for the last year.

Q. After you married Mrs. Hazelton have you had occasion to go to war?

A. I did.

THE COURT: Why go into that?

MR. WEST: Well, I wanted to get his absence from home, is all.

MR. McEVERS: It doesn't even appear yet that he was there at the time these facts—

THE COURT: Let's get on, gentlemen. It seems to me we are taking a great deal of time with immaterial matters here. If he knows anything about this case let us get at the facts.

Q. What time, Mr. Hazelton, did you leave for the east?

A. The 6th or 7th of October, 1922.

Q. And who went with you?

A. My wife, Mrs. Hazelton.

Q. And what time did you return?

A. On the afternoon of the 5th of November, 1922.

Q. Now you were there on the 6th of November, the date that the defendant is accused of selling a bottle of whiskey?

A. The morning of the 6th, yes, sir.

Q. State to the jury what time you and Mrs. Hazelton left, if you did at all, to go to some other place.

A. Well, on the afternoon of the 5th we got in about, I imagine—

THE COURT: Can't you answer the question, sir? What time in the morning did you leave, if you left at all?

A. Between nine and ten o'clock.

Q. Where did you go?

A. We started for Colton, Washington.

Q. And who were with you?

A. Mrs. Hazelton.

Q. You and her alone?

A. Yes, sir.

Q. How did you go?

A. In my car.

Q. And where did you go to?

A. We started for Colton, but we only got about two-thirds up the hill, the spiral highway.

Q. What was the reason you didn't go to Colton?

MR. McEVERS: Objected to as immaterial.

THE COURT: Overruled. Did you have a break down or what?

A. Yes, sir.

Q. State to the jury how your accident happened there, briefly.

THE COURT: No, you needn't even state it briefly.

Q. How long were you detained there?

A. About two and a half or three hours, somewhere around there, possibly four hours altogether.

Q. And then where did you go?

A. I got back into, coasted back down the hill into Lewiston, or to the foot of the hill, rather, not into Lewiston.

Q. Did you finally get to Lewiston?

A. Finally, yes, sir.

Q. And what time was it?

A. I imagine about between probably two and three; I can't tell exactly; it was in the afternoon.

Q. Who took you to Lewiston, if anyone?

A. A garage man, Small & Kennedy's garage; he was an employe.

Q. Your car wouldn't run at the time?

A. No, sir; I put it out of commission on the hill.

Q. During this day, October 6th, or November 6th, rather, did you see Mr. Marler up at the Central Rooms before you left on your trip?

A. On the 6th?

Q. Yes.

A. No, sir, I did not.

Q. You were there all the time until you left for Pullman?

A. We left about nine, between nine and ten. Yes, I was there up until the time we left for Colton.

Q. I mean Colton.

A. Yes, sir.

Q. And was your wife there, if you know?

A. Yes, sir.

Q. Was there a lady, if you remember, stopping at your hotel at that time, in room 5?

A. Well, I never saw the lady myself. I couldn't say that she was there.

Q. Stopping at the hotel prior to this date?

A. She had been there, yes.

Q. Were you away during a short period before the 6th of October?

A. Of October?

Q. I mean the 6th of November.

A. I was away about thirty days, yes, sir.

Q. She had been there then at the hotel during the time that this lady was supposed to have taken charge of the hotel?

THE COURT: What was that, Mr. West?

MR. WEST: I say this lady that had charge of room 5, or was in room 5.

THE COURT: He says he never saw her; he was away.

MR. WEST: I understood him to say he knew she was there.

THE COURT: No, he didn't say he knew she was there. I understood you to say you never saw this lady?

A. I never saw this lady, no, sir.

THE COURT: Very well.

MR. WEST: That is all.

CROSS EXAMINATION.

By MR. McEVERS.

Q. You say that you were in the hotel constant-

ly on the morning of the 6th until you left at nine A. M.?

A. Well, I slept there, and I got up rather early, and I went to the garage and got my car, and come back to the hotel, and I got the wife and we started for Colton.

Q. You weren't there constantly then?

A. Not constantly, no, sir.

MR. McEVERS: That is all.

MR. WEST: That is all.

MR. JOHNSON: Call Mrs. Hazelton.

(Witness excused.)

RUTH HAZELTON, produced as a witness on behalf of defendant, being first duly sworn, testified as follows:

DIRECT EXAMINATION.

By MR. JOHNSON.

Q. State your name.

A. Mrs. Ruth Hazelton.

Q. You are the defendant in this action?

A. Yes, sir.

Q. You are the proprietor of the Central rooming house or lodging house or hotel?

A. Yes, sir.

Q. How long have you been running that Central Hotel, Mrs. Hazelton?

A. For the past two and a half years.

Q. Directing your attention to the latter part of September, the fore part of October, and up to the

6th day of—or the 5th day of November, had you and your husband been away from Lewiston for a while?

A. We took a trip to Chicago.

Q. When you were away who did you leave in charge of your place of business?

A. Joyce Black.

Q. What instructions did you give, if any, to Joyce Black with reference to handling of intoxicating liquors or permitting it to be around or about the Central Hotel?

MR. McEVERS: Objected to as self-serving and immaterial.

THE COURT: Sustained.

Q. Well, in any event you returned home on the—what time on the 5th, what time did you arrive in Lewiston?

A. In the middle part of the afternoon.

Q. Had you made this trip in a car?

A. Yes, sir.

Q. At the time you were away was Joyce Black an employe of yours, or was she running the place on her own account?

A. She was just taking care of it. I told her to take good care of it.

Q. What arrangements did you have for the pay?

A. She was to pay all the bills, and what was over she was to have for her salary.

Q. Directing your attention to the morning of

the 6th of November, did you leave on the morning of the 6th?

A. Yes, sir.

Q. What time did you leave?

A. Past nine o'clock, between nine and ten.

Q. About what time did you return to Lewiston?

A. It was past two o'clock in the afternoon.

Q. On the morning of the 6th day of November did you see Mr. Marler, a government prohibition—

A. No, sir.

Q. —Inspector, is that what you call it?

MR. McEVERS: Agent.

MR. JOHNSON: Agent?

A. No, sir.

Q. I show you Plaintiff's Exhibit No. 1 in evidence, and ask you whether or not on the morning of the 6th day of November you sold or had anything to do with the sale or delivery—

A. No, sir.

Q. Wait a minute. —of this bottle, to Mr. Marler, or to anyone else?

A. No, sir.

Q. Did you see Mr. Marler at all on the morning of the 6th day of November?

A. No, sir.

Q. What was the first time that you ever saw Mr. Marler to know him?

A. In Mr. O'Neil's office, I didn't know the man, and I asked the—

THE COURT: No, don't state what you asked. You didn't know him until you saw him in Mr. O'Neil's office?

A. I didn't know him.

Q. You heard some testimony by the maid in reference to a woman that was at the hotel there besides Joyce Black. Do you know what her name was?

A. I think she registered by the name of Brown, but I knew her by the name of Ruby. That is what the other lady called her, Ruby.

Q. How long did she and Miss—Is it Miss Black, or Mrs. Black, or is it just Babe or Joyce?

A. I couldn't say.

Q. In any event, referring to her, how long did she stay there at the hotel after you returned from Chicago?

A. Just a few days.

Q. You heard the testimony of Mrs. Samuelson this morning, in which she says that on two or three different occasions you sold her and other men, or men, while she was present, some liquor, moonshine whiskey.

A. Yes, sir.

Q. Did you ever sell her any such thing?

A. No, sir.

Q. Or any of the rest of them?

A. No, sir.

Q. Did any such thing as that occur?

A. No, sir.

Q. Did you ever sell any moonshine whiskey or other intoxicants to any person?

A. No, sir; I don't approve of it.

Q. Did you hear the testimony of Mr. Grasty in reference to the fact that he claimed that he bought some drinks of you?

A. Yes, sir.

Q. On one occasion by himself and on another occasion with Asa Mishler. Did any such thing as that occur?

A. No, sir.

Q. Did you ever sell William H. Grasty or Asa Mishler or either one or both—

A. No, sir.

Q. —any intoxicating liquors?

A. No, sir.

Q. Did you ever give them any intoxicating liquors?

A. No, sir. I don't have it in the house.

Q. I will ask you if about a week ago, in the City of Lewiston, Mrs. Sadie Samuelson stated to you in word and substance to the effect that if you didn't return to her the amount of money she had paid on the Kendrick rooms that she would make it hot for you, or word in substance to that effect?

A. Yes, sir, on the telephone she stated that.

Q. Had she been demanding of you the return of money for the Kendrick rooms?

A. Yes, sir.

Q. And just state what occurred between you

and her after you sold this.

MR. McEVERS: Objected to.

THE COURT: No. You need not go into that. Objection sustained.

Q. (By MR. JOHNSON) Did she evidence a good deal of ill-feeling towards you?

A. Yes, sir.

MR. McEVERS: Objected to as immaterial.

THE COURT: Sustained.

Q. (By MR. JOHNSON) By the way, just one or two more questions, Mrs. Hazelton. Of whom does your family consist besides your husband?

A. My son and my husband.

Q. Where does your son live?

A. Colton.

Q. Was your son living in Colton at the time you returned from Chicago?

A. Yes, sir.

Q. Does he go to school there?

A. Yes, sir.

Q. I guess I asked you. He wasn't with you when you went to Chicago?

A. No, sir.

Q. I show you this document and ask you to state now just generally what it is.

A. It is the register from the hotel.

Q. Central Hotel?

A. Yes, sir.

Q. I direct your attention here to date of October 22, 23 and 24 and 25, particularly this entry

here. I direct your attention particularly to that.

A. Yes.

MR. McEVERS: I object to it on the ground that it is immaterial. There has been no sufficient yet to show what this person's name was that purported to have registered in that room.

MR. JOHNSON: Well, I haven't offered that yet, but I was going to ask some more questions.

MR. McEVERS: All right.

Q. (By MR. JOHNSON) You referred to a woman who was occupying room 5 in the hotel. Did you examine the hotel register afterwards to see who she was and what her name was?

A. Yes, sir, I did that the day I came home.

Q. I direct your attention then to this register of the Central Hotel, and ask you if that is the woman that you referred to as occupying room 5 on the 6th of November?

A. This is Mrs. Brown. They had a concession during the fair and they was here.

MR. McEVERS: I object to its introduction on the ground that it is only a part of the register. If they were going to introduce the register of that hotel we should have it all here, and we could see whether or not anyone else had taken that room subsequently. Furthermore, there is not sufficient proof to show that it was Mrs. Brown, she testifying here that she didn't know the name a few moments ago, said her name was Ruby.

WITNESS: She had two or three different names.

THE COURT: Just a moment. The objection is sustained.

MR. JOHNSON: That is all for the present.

CROSS EXAMINATION.

By MR. McEVERS.

Q. How long have you operated the Central rooming house?

A. Two years and a half past.

Q. How many rooms have you there?

A. Thirty-two.

Q. Approximately how many roomers do you have a night?

A. Fill them up every night.

Q. How much do you charge a room?

A. Fifty, seventy-five and a dollar.

Q. When did you first get acquainted with this girl you refer to as Babe Black.

A. She came to my house as a roomer.

Q. When?

A. About a month before.

Q. About a month before when?

A. I know her about four weeks before I went away.

Q. What was she doing at the time she was there before you went away?

A. I couldn't say.

Q. All you knew was that she went by the name of Babe?

A. Yes. She was sickly; she had an operation.

Q. You didn't know of any other name she had?

A. Joyce Black, I said.

Q. You don't know whether she was a Miss or Mrs.?

A. No, sir.

Q. You don't know where she came from?

A. No.

Q. You don't know where she went afterwards?

A. No, sir.

Q. How much revenue did you ordinarily make from that rooming house a day? You had about 30 rooms, you say?

A. Yes, sir.

Q. And they were full every night?

A. Yes, sir.

Q. And they rented from fifty cents to a dollar apiece?

A. Yes, sir.

Q. So you took in around twenty-five or thirty dollars a day?

A. Sometimes twenty, sometimes fifteen, and sometimes ten.

Q. You owned the furniture in that place?

A. Yes, sir.

Q. How much was that worth?

A. I don't know. If you went to buy it, what it would be worth.

Q. You had the furniture and rooming house of 30 rooms?

A. Yes, sir.

Q. Yet you just turned that whole thing over to a woman you never knew, and went away, did you?

A. She just came out of the hospital and I thought she would be a competent woman.

Q. You didn't even know who the woman was?

A. I had confidence in her.

Q. You didn't employ her on a salary?

A. No, sir.

Q. You just told her to take the business and take the profits?

A. Pay the expenses and keep the profits, what there was.

Q. And it run around $25 a day?

A. Sometimes ten and fifteen.

Q. She was in charge there for a period of a couple of weeks, was she?

A. About a month.

Q. And then you came back on the 5th of November?

A. Yes, sir.

Q. Now this other woman that you say was in room 5, you just knew her by the name of Ruby?

A. Mrs. Brown, but Ruby was her first name.

Q. Didn't you testify on direct examination that all you knew was her name was Ruby?

A. I couldn't say her name because I didn't know for sure what her name was, only by Brown on the register. I didn't know whether it was her real name.

Q. Was she there when she went away?

A. The first time?

Q. Yes?

A. No, sir

Q. She was there when you came back?

A. Yes, sir.

Q. How long did she stay after you came back?

A. Just a few days, two days.

Q. What was her business, if you know?

A. Her husband and her traveled with the carnival.

Q. You say that you have never sold any intoxicating liquor up there?

A. No. sir.

Q. Never had any in your possession there?

A. No. sir.

Q. Isn't it a fact that you had several bottles of beer in your possession there in June when the officers came and searched your place?

A. I never even saw it. I was confined in a wheel chair, and practically was in my bed the day they came. I had an operation.

Q. You saw them come and get it, didn't you?

A. They said they were going to take it.

Q. And they did, didn't they?

A. Yes, sir.

Q. And you went down subsequently to that and pleaded guilty to the offense of running a disorderly house?

MR. JOHNSON: I object. The Court struck

that out.

THE COURT: Overruled.

Q. You went down and pleaded guilty to running a disorderly house?

A. I had eight stitches in each foot, and couldn't stand—

THE COURT: Just answer the question.

Q. (By MR. McEVERS) Isn't that true?

A. Yes, sir; I did.

Q. I will ask you whether or not at the time of the preliminary hearing when you were arrested on this particular offense, if you didn't tell Agent Marler that you had that beer there and that you had it for medicinal purposes?

A. No, sir. I had no conversation with that man in my life.

Q. Not even at the time of the preliminary?

A. I just asked him if he couldn't have been mistaken, or if his conscience didn't hurt him, to take me up there, and he said no, and that is all I asked the man.

Q. And you didn't make the statement that you had that beer there for medicinal purposes?

A. No, sir, because I didn't know what it was.

Q. And you say you don't approve of drinking liquor?

A. No, sir; I am not a drinking woman myself.

Q. And you don't approve of anyone else doing it?

A. No, sir.

Q. What does your husband do?

A. Well, he is a mechanic. He is a jack of all trades, I should judge; he can do anything.

MR. McEVERS: That is all.

RE-DIRECT EXAMINATION.

By MR. JOHNSON.

Q. You were asked with reference to some so-called proposition of beer. Just state to the jury what you know about that matter anyway, that was testified to, with reference to.

THE COURT: That is too general.

Q. Just state now—

THE COURT: She stated she didn't know it was there.

A. I pleaded to something I didn't even know I was pleading to. I pleaded to get out of there, as I never was arrested in my life before.

MR. JOHNSON: That is all.

MR. McEVERS: That is all.

MR. JOHNSON: I would like to recall Mr. Hazelton just for one thing, and I think that will close our case.

(Witness excused.)

E. T. HAZELTON, heretofore duly sworn on behalf of defendant, upon being recalled, testified as follows:

DIRECT EXAMINATION.

By MR. JOHNSON.

Q. Mr. Hazelton, I show you this document, and ask you whether or not that is the memorandum of bill furnished you by the garage the morning you had, you started to Colton?

A. It is.

MR. McEVERS: I object to it on the ground that it is immaterial.

MR. JOHNSON: We now offer in evidence this document.

MR. McEVERS: It is hardly material that they were away from nine to two anyway, if the Court please.

THE COURT: Oh, it may go in.

Said paper was marked—

DEFENDANT'S EXHIBIT NO. 2.

MR. JOHNSON: Eleven six. Owner's name, Hazelton. Description of work. Welding oil groove in oil pump. Two hours and thirty minutes. Then material, twenty-five cents, three-fifteen, and three-forty. Mechanic's name, C. Nelson.

MR. JOHNSON: That is all.

CROSS EXAMINATION.

By MR. McEVERS.

Q. What is your business?

A. I have been a machinist a few years.

Q. What is your present employment?

A. I am doing some building at present.

Q. Where?

A. Weippe, Idaho.

Q. For whom?

A. Myself.

Q. What did you do before that?

A. I have property in Yakima.

Q. Have you lived in Yakima recently?

A. Yes, sir.

Q. How long since you lived there?

A. About nine months or ten.

Q. Did you live there while your wife was in Lewiston?

A. Yes, sir.

Q. How much property did you have over there?

A. Ten acres.

Q. What kind of land is it?

A. Fair.

Q. Tillable farm land?

A. Yes.

Q. Out in the country?

A. Yes, sir.

Q. Did you rent it?

A. Yes, sir.

Q. Is that all the property you have?

A. Yes, sir.

Q. How long since—Have you ever been employed?

A. Not for the last few years I haven't. I have been working for myself.

Q. Who are you working for at the present time?

A. Myself.

Q. Do you own property?

A. Yes, sir.
Q. At Weippe?
A. Yes, sir.
Q. What kind of property?
A. Building property, city property.
Q. And your wife lives in Lewiston?
A. Yes, sir.
MR. McEVERS: That is all.

RE-DIRECT EXAMINATION.

My MR. JOHNSON.

Q. Were you in business in Yakima prior to this time?
A. Yes, sir.
Q. What business were you in there?
A. I had a chicken dinner resort.
Q. How long were you in business in Yakima, Mr. Hazelton?
A. About two years.
Q. You conducted your own business?
A. I did.
Q. You have no interest in the Central Hotel? That is your wife's property?
A. I have not; no, sir.
MR. JOHNSON: That is all.

RE-CROSS EXAMINATION.

By MR. McEVERS.

Q. What sort of business is this chicken dinner resort?
A. Just like any other. Go out and order your

chicken dinner, and you will get it.

Q. Where do you go to get it?

A. To me.

Q. Where did you operate?

A. In Yakima.

Q. Right in town?

A. A mile and a half out.

Q. Any party going out from Yakima would go out to your place and order a chicken dinner?

A. Exactly.

Q. That is all you did, had chicken dinners?

A. And dance.

Q. A kind of a road house?

A. You may call it that if you wish, yes.

MR. McEVERS: That is all.

MR. JOHNSON: The defense rests.

MR. McEVERS: We will call Mr. Marler.

(Witness excused.)

FRANK M. MARLER, a witness heretofore duly sworn on behalf of plaintiff, upon being recalled in rebuttal, testified as follows:

DIRECT EXAMINATION.

By MR. McEVERS.

Q. I will ask you, Mr. Marler, whether or not you had a conversation with the defendant, Ruth Hazelton, at the time of the preliminary hearing, in which she told you that she had that beer in her possession in June for medicinal purposes.

A. I did, yes.

Q. Was that the substance of the conversation?

A. Yes, sir.

Q. I will ask you whether or not you had a conversation with Ruth Hazelton at the time you made the purchase, whether or not you did.

MR. JOHNSON: That is objected to as absolutely part of their case in chief, and having already been testified to by the witness.

MR. McEVERS: For the purpose of identification. They have denied identity.

THE COURT: I think I will let him answer.

A. Just a slight conversation?

Q. What was it?

A. Why, just a general conversation. I don't remember exactly. I think I asked her where she was from or something, and mentioned the fact that I had never seen her there before, or words to that effect, and talked to her a little while, and then I talked to Miss Black.

Q. What did Ruth Hazelton say?

A. She told me she had just returned from a vacation, I remember, and was just going to take the place over, back again.

Q. Are you sure it was Ruth Hazelton you were talking to?

A. I am certain of it.

MR. McEVERS: That is all.

The Government rests.

THE COURT: The argument will be limited to twenty-five minutes a side.

(The case was thereupon argued to the jury by counsel.)

THE COURT: Gentlemen, my instructions to you will be very brief. These three charges upon which the defendant is being tried are all based upon different provisions of the National Prohibition Act. There is the possession of intoxicating liquor. I need not explain that charge to you. It has been explained by counsel for both sides, and there is no difference of opinion as to the meaning of the law. And so with the second count, which involves the charge of selling. The law is very simple, and you doubtless understand it now as well as I could explain it to you.

Just a word with regard to the third count, which is the charge of a nuisance. The statute provides that it shall be unlawful for any person to maintain a house or other place where intoxicating liquor is unlawfully kept or sold or manufactured. In other words, to keep a place where intoxicating liquor is manufactured or sold or kept constitutes a nuisance. Now it isn't necessary, of course, to show a great many different specific acts of sale or keeping of liquor or of manufacture. Sometimes it is possible to infer that liquor is being habitually sold at a place merely from one transaction. It would depend upon the surrounding circumstances of that transaction. As, for instance, if you were to go down here into a hardware store and buy a single article of hardware, from your

ability to make that one purchase and what you saw there and the general circumstances you might reasonably conclude that someone was engaged in the hardware business there. So one might buy liquor at a place under such circumstances that the single sale would be to the ordinary man conclusive proof that the person who was maintaining the house or place was maintaining a nuisance, that is, was maintaining a place where liquor was being more or less habitually sold and kept in violation of the law. I say that much to you in order that you may understand that it is not necessary in all cases to prove a series of acts. It is a question whether the specific acts which are proven in the case, together with the reasonable inferences therefrom, convince you that liquor was more or less continually kept in this place and sold there, and with the knowledge and consent or under the direction of the defendant who is on trial. That is the issue touching that particular count of the information.

Now the form of verdict which will be handed to you to be used in this case will require that you find separately upon each one of these three counts or charges, that is, you will find the defendant guilty or not guilty of the charge of possession, guilty or not guilty upon the charge of sale, and guilty or not guilty upon the charge of maintaining a nuisance.

As you have been repeatedly advised, she is pre-

sumed to be innocent of each one of these charges, and the burden was upon the Government to establish her guilt by evidence which is sufficient to convince you beyond a reasonable doubt. Generally in that respect I have this to say to you. If after you have fairly considered all of the evidence in the case, judging of it in the light of your own experience in dealing with people and in human affairs, and in the light of all the circumstances so far as they appear in evidence, if you can candidly say to yourself that you have an abiding conviction of the truth of the charge, that is, of the guilt of the defendant, then you should find her guilty, that is, I mean such a conviction as you gentlemen would be willing to act upon in the most important affairs of your own lives. Now if, upon the other hand, after such consideration of all of the evidence, you cannot conscientiously say that you have that abiding conviction of the truth of the charge, then you have a reasonable doubt, and you should acquit.

It is necessary that all of you concur in finding a verdict.

Let an officer be sworn, Mr. Clerk.

(Bailiff sworn.)

THE COURT: You may retire in charge of the officer.

(The jury thereupon retired from the court room in charge of the bailiff.)

*In the District Court of the United States for the District of Idaho, Central Division.*

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May term, 1923.

UNITED STATES OF AMERICA,

vs.

RUTH HAZELTON,

*Defendant.*

No. 1816.

VERICT.

We, the jury in the above entitled cause, find the defendant Not Guilty on the first count, Not Guilty on the second count, and Guilty on the third count, as charged in the information.

CALVIN BOYER,

*Foreman.*

(Endorsed) U. S. District Court, District of Idaho. Filed May 22, 1923,

W. W. McREYNOLDS, Clerk.

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ASSIGNMENT OF ERRORS.

The defendant Ruth Razelton in this case, in connection with the petition for writ of error, makes the following assignment of errors which she avers occurred upon the trial of said cause, namely:

1.

The Court erred in sustaining the objection to the following questions asked of the witness W. H. Grasty:

"By MR. JOHNSON: Q. You never stater to them that you had bought any liquor or that she had given you any liquor or that you were present when any liquor was sold."

2.

The Court erred in permitting Eugene Gasser to testify as to the records of the police court in connection with an alleged arrest of the defendant Ruth Hazelton.

3.

The Court erred in overruling the objection to the question propounded by Mr. McEvers on cross-examination of the witness Jake Miller, to-wit:

"Q. She paid a fine for you recently, didn't she?"

and the following question to the same witness:

"Q. Isn't it a fact that very recently you were arrested and fined in Lewiston and she paid half of that for you, twenty-five dollars?"

4.

The Court erred in sustaining the objection to the question asked of the defendant Ruth Hazelton on direct examination:

"Q. What instruction did you give, if any, to Joyce Black with reference to the handling of intoxicating liquors or permitting it to be around or about the Central Hotel?"

5.

The Court erred in overruling the objection to a question on cross-examination of Ruth Hazelton:

"Q. And you went down subsequent to that and pleaded guilty to the offence of running a disorderly house."

6.

The Court erred in permitting any evidence in reference to the defendant Ruth Hazelton having been arrested by the police of the city of Lewiston and in reference to any alleged beer.

Wherefore, the defendant respectfully asks the Court to allow and settle the foregoing Bill of Exceptions and make the same a record in this cause.

MILES S. JOHNSON,
T. B. WEST,
*Attorneys for Defendant.*

ORDER SETTLING AND ALLOWING BILL OF EXCEPTIONS.

The said bill of exceptions having been duly presented to the court is now in the presence of the United States Attorney and counsel for the defendant settled and allowed, and made a record in said cause. Dated this 26th day of May, 1923.

FRANK S. DIETRICH,
*District Judge.*

Service by copy duly admitted of the foregoing bill of exceptions this 26th day of May, 1923.

JOHN H. McEVERS,
*Asst. United States Attorney.*

Endorsed,
Filed May 26, 1923,
W. D. McREYNOLDS, Clerk.

(Title of Court and Cause.)

No. 1816.

PETITION FOR WRIT OF ERROR.

Your petitioner, Ruth Hazelton, the above named defendant, brings this her petition for a writ of error to the District Court of the United States for the District of Idaho, and thereupon shows that on the 22nd day of May, 1923, there was rendered and entered in the above entitled court a judgment against your petitioner whereby she was adjudged and sentenced to imprisonment in the County Jail of Nez Perce County, State of Idaho, for the following term, to-wit: For the term of sixty days and a fine of Five Hundred Dollars; in which judgment as aforesaid and the proceedings had prior thereto in this cause certain errors were committed to the prejudice of this defendant, all of which will more in detail appear from the assignment of errors.

Whereupon this defendant prays that a writ of error may issue in her behalf to the United States Circuit Court of Appeals for the Ninth Circuit, for the correction of errors so complained of, and that a transcript of the record, proceedings and papers in this cause, duly authenticated, may be sent to the said Circuit Court of Appeals.

MILES S. JOHNSON,
T. B. WEST,
*Attorneys for Defendant.*
Residing at Lewiston, Idaho.

Service acknowledged.

Endorsed,

Filed May 26, 1923,

W. D. McREYNOLDS, Clerk.

---

(Title of Court and Cause.)

No. 1816.

ORDER ALLOWING WRIT OF ERROR.

Now at this time comes the defendant and presents to the Court her petition for the allowance of a writ of error from the United States Circuit Court of Appeals for the Ninth Circuit to the above entitled Court, and has presented her bond for appearance in the sum of One Thousand Dollars, that being the amount of bail heretofore fixed by this Court.

Whereupon, it was ordered that said bond be accepted and approved, the prayer of said petitioner be granted, and that the Clerk of this Court be and he is hereby directed to issue the writ of error prayed for in this petition, and that sentence and execution in said cause be stayed until the final disposition of said writ in said United States Circuit Court of Appeals for the Ninth Circuit.

Dated this 26th day of May, 1923.

FRANK S. DIETRICH,

*District Judge.*

Endorsed,

Filed May 26, 1923.

W. D. McREYNOLDS, Clerk.

(Title of Court and Cause.)

Approved May 26, 1923,
Dietrich, Judge.

SUPERSEDEAS BOND.

KNOW ALL MEN BY THESE PRESENTS: That we, Ruth Hazelton, as Principal, and the Hartford Accident and Indemnity Company, a corporaof the State of Connecticut, whose principal place of business is at Hartford, Connecticut, as Surety, are held and firmly bound unto the United States of America in the full and just sum of One Thousand Dollars ($1000.00), to be paid to the United States of America, to which payment well and truly to be made we bind ourselves, our heirs, executors, administrators and successors or assigns, jointly and severally by these presents.

Sealed with our seals and dated this 25th day of May, 1923.

WHEREAS, lately at the May Term, A. D., 1923. of the District Court of the United States for the District of Idaho, Central Division thereof, in the suit pending in said Court between the United States of America and Ruth Hazelton, a judgment and sentence was rendered against the said Ruth Hazelton, and the said Ruth Hazelton has obtained a writ of error from the United States Circuit Court of Appeals for the Ninth Circuit to reverse the judgment and sentence in the aforesaid suit:

NOW, THE CONDITION OF THE ABOVE OBLIGATION IS SUCH, that if the said Ruth

Hazelton shall appear either in person or by attorney in the United States Circuit Court of Appeals for the Ninth Circuit on such day or days as may be appointed for the hearing of said cause in said Court, and prosecute her writ of error and shall abide by and obey all orders made by the United States Circuit Court of Appeals for the Ninth Circuit in said cause and shall surrender herself in the execution of the judgment and sentence appealed from and pay any fine that has been or may be imposed upon her, as said Court may direct, if the judgment and sentence against her shall be affirmed, and if she shall appear for trial in the District Court of the United States for the District of Idaho on such day or day as may be appointed for a retrial by said District Court and abide by the judgment and sentence against her in case said judgment shall be reversed by the United States Circuit Court of Appeals, for the Ninth Circuit, then the above obligation to be void, otherwise to remain in full force, virtue and effect.

MRS. RUTH HAZELTON, (SEAL)
HARTFORD ACCIDENT & INDEMNITY COMPANY,
By M. L. Tyler,
*Its Attorney-in-Fact.*

(Corporate Seal)

State of Idaho, )
) ss.
County of Nez Perce,)

I, M. L. Tyler, being first duly sworn, on oath

depose and say, that I am the attorney-in-fact and the duly authorized agent of the Hartford Accident & Indemnity Company of Connecticut, the surety on the foregoing undertaking attached hereto; that the said Hartford Accident & Indemnity Company has complied with all of the requirements of law to execute surety bonds in the State of Idaho; that this affiant has executed the said bond for said Surety company as such attorney-in-fact, and that his authority is duly recorded in Nez Perce County, State of Idaho.

M. L. TYLER.

Subscribed and sworn to before me this 25th day of May, 1923.

(SEAL)

GENO GIBSON,
*Notary Public for State of Idaho.*
Residing at Lewiston, Nez Perce County therein.
My commission expires, Mar. 3, 1924.

Endorsed,
Filed May 26, 1923,
W. D. McREYNOLDS, Clerk.

---

(Title of Court and Cause.)

No. 1816

PRAECIPE.

*To the Clerk of the United States District Court for the Above Named Division and District:*

You are hereby requested to make the record in

the above styled and numbered cause to consist of the following parts of said record, for transmission to the United States Circuit Court of Appeals for the Ninth Circuit, to-wit:

1. Information.
2. Bill of Exceptions, including Reporter's Transcript of Trial.
3. Assignment of Errors.
4. Petition for Writ of Error.
5. Order allowing Writ of Error.
6. Supersedeas Bond.
7. Writ of Error.
8. Citation on Writ of Error.
9. This praecipe.

Respectfully,

MILES S. JOHNSON,
T. B. WEST,
*Attorneys for Defendant,*
Residence and P. O. Address, Lewiston, Idaho.

Service acknowledged.

Endorsed, Filed May 31, 1923.
W. D. McREYNOLDS, Clerk.

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(Title of Court and Cause.)

No. 1816.

WRIT OF ERROR.

THE UNITED STATES OF AMERICA—ss.

The President of the United States of America, to

the Judges of the District Court of the United States for the District of Idaho—GREETING.

Because in the records and proceedings as also in the rendition of the judgment of a plea which is in the District Court before Honorable Frank S. Dietrich, one of you, between the United States of America, Plaintiff, and Defendant in Error, and Ruth Hazelton, Defendant, and Plaintiff in Error, a manifest error hath happened to the great damage of the said Plaintiff in Error, as by complaint doth appear, and we being willing that error, if any hath happened, should be duly corrected and full and speedy justice done to the parties aforesaid, in this behalf we do command you if judgment be therein given that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you may have the same at San Francisco, California, within thirty days from the date hereof in the said Circuit Court of Appeals, to be therein and there held; that the record and proceedings aforesaid be then and there inspected, that the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States of America should be done.

WITNESS the Honorable William Howard Taft,

Chief Justice of the Supreme Court of the United States, this May 25th, 1923.

FRANK S. DIETRICH,
*Judge.*

(SEAL)

W. D. McREYNOLDS,
*Clerk of the District Court of the United States for District of Idaho.*

Service of the within Writ of Error made this day upon the District Court of the United States for the District of Idaho by filing with me as Clerk of said Court a duly certified copy of said Writ of Error May 26, 1923.

(SEAL) W. D. McREYNOLDS,
*Clerk of the United States District Court, District of Idaho.*

Endorsed, Filed May 26, 1923,
W. D. McREYNOLDS, Clerk.

---

(Title of Court and Cause.)

No. 1816.

CITATION ON WRIT OF ERROR.

UNITED STATES OF AMERICA, )
) ss.
District of Idaho, )

To the United States of America—GREETING:

You are hereby cited and admonished to be and appear before the United States Circuit Court of Appeals for the Ninth Circuit at San Francisco,

California, within thirty days from the date hereof, pursuant to a writ of error filed in the Clerk's office of the District Court of the United States for the District of Idaho, wherein Ruth Hazelton is Plaintiff in Error and you are Defendant in Error, to show cause, if any there be, why the judgment in said Writ of Error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Given under my hand at Moscow, Idaho, in said District this 26th day of May, 1923.

FRANK S. DIETRICH,

(SEAL) *Judge.*

Attest:

W. D. McREYNOLDS,

*Clerk*

Due and legal service of the attached and foregoing citation is hereby accepted and admitted at Moscow, Idaho, this 26th day of May, 1923.

JOHN H. McEVERS,

*Asst. United States Attorney for the District of Idaho.*

Endorsed, Filed May 26, 1923,

W. D. McREYNOLDS, Clerk.

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(Title of Court and Cause.)

No. 1816.

CLERK'S CERTIFICATE.

I. W. D. McReynolds, Clerk of the District Court

of the United States for the District of Idaho, do hereby certify the foregoing transcript of pages numbered from 1 to 122, inclusive, to be full, true and correct copies of the pleadings and proceedings in the above entitled cause, and that the same together constitute the transcript of the record herein upon Writ of Error to the United States Circuit Court of Appeals for the Ninth Circuit, as requested by the praecipe filed herein.

I further certify that the cost of the record herein amounts to the sum of $141.35, and that the same has been paid by the Plaintiff in Error.

Witness my hand and the seal of said Court this 9th day of July, 1923.

W. D. McREYNOLDS,

(SEAL) *Clerk.*

In the District Court of the United States for the District of Idaho, Central Division.

May term, A. D. 1923. Present, Hon. FRANK S. DIETRICH, Judge.

No. 1816.

THE UNITED STATES

against

RUTH HAZELTON,

Defendant.

Convicted of Violation of National Prohibition Act.

**Judgment.**

NOW, on this 22d day of May, 1923, the United States District Attorney, with the defendant and her counsel, Messrs. Miles S. Johnson and T. B. West, came into court; the defendant was duly informed by the Court of the nature of the information filed against her for the crime of Violation of National Prohibition Act committed on the 6th day of November, A. D. 1922, of her arraignment and plea of not guilty, of her trial and the verdict of the jury on the 22d day of May, A. D. 1923, "Guilty as charged in the information." The defendant was then asked by the Court if she had any legal cause to show why judgment should not be pronounced against her, to which she replied that she had none, and no sufficient cause being shown or appearing to the Court,

"Now, therefore, the said defendant having been convicted of the crime of Violation of National Pro-

hibition Act, it is hereby considered and adjudged that the said defendant Ruth Hazelton do pay a fine of Five Hundred ($500.00) Dollars, and that she be imprisoned and kept in the Nez Perce County Jail for a term of sixty days. Upon giving a $1000.00 bond, defendant was granted stay of execution until May 26th, 1923."

United States of America,
District of Idaho,—ss.

I, W. D. McReynolds, Clerk of the United States District Court for the District of Idaho, do hereby certify that the foregoing copy of judgment in cause No. 1816, United States vs. Ruth Hazelton, has been by me compared with the original, and that it is a correct transcript therefrom and of the whole of such original, as the same appears of record and on file at my office and in my custody.

In testimony whereof, I have set my hand and affixed the seal of said Court in said District this 17th day of July, 1923.

[Seal] W. D. McREYNOLDS,
Clerk.

By ——————————,
Deputy.

[Endorsed]: No. 4056. United States Circuit Court of Appeals for the Ninth Circuit. Ruth Hazelton, Plaintiff in Error, vs. United States of America, Defendant in Error. Certified Copy of Judgment of U. S. District Court. Filed Jul. 20, 1923. F. D. Monckton, Clerk. By Paul P. O'Brien, Deputy Clerk.

No. 4056

IN THE

# United States
# Circuit Court of Appeals
## For the Ninth Circuit

RUTH HAZELTON,
*Plaintiff in Error,*
*vs.*
THE UNITED STATES OF AMERICA,
*Defendant in Error.*

## Brief of Plaintiff in Error

CANNON & M'KEVITT,
710 Old National Bank Building,
Spokane, Washington.
MILES S. JOHNSON,
T. B. WEST,
Lewiston, Idaho.
*Attorneys for Plaintiff in Error.*

Filed.....Clerk.

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IN THE

# United States
# Circuit Court of Appeals

## For the Ninth Circuit

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|---|---|
| RUTH HAZELTON, *Plaintiff in Error,* vs. THE UNITED STATES OF AMERICA, *Defendant in Error.* | No. 4056 |

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## Brief of Plaintiff in Error

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### STATEMENT OF THE CASE.

Plaintiff in error is charged with violation of the National Prohibition Act. The information is as follows:

(Title of Court and Cause.)

Information.

No. 1816.

E. G. DAVIS, United States Attorney for the District of Idaho, who for the United States in this behalf prosecutes in his own person comes into Court on this 27th day of December, 1922, and with leave of the Court first had and obtained upon his official oath gives the Court here to understand and to be informed as follows:

COUNT ONE.

(Possession.)

That Ruth Hazelton, late of the County of Nez Perce, State of Idaho, heretofore, to-wit: on or about the 6th day of November, 1922, at Lewiston, Idaho, in the said County of Nez Perce, in the Central Division of the District of Idaho and within the jurisdiction of this Court did then and there wilfully, knowingly, and unlawfully have in her possession certain intoxicating liquor containing more that one-half of one per cent of alcohol, to-wit: one pint of a certain spiritous liquor commonly known as "moonshine whiskey," the same being designed, intended and fit for use as a beverage, the possession of same being then and there prohibited and

unlawful and contrary to the form of the statute in cases made and provided, and against the peace and dignity of the United States of America.

COUNT TWO.

(Sale.)

That Ruth Hazelton, late of the County of Nez Perce, State of Idaho, heretofore, to-wit: on or about the 6th day of November, 1922, at Lewiston, Idaho, in the said County of Nez Perce in the Central Division of the District of Idaho and within the jurisdiction of this Court did then and there wilfully, knowingly and unlawfully sell a quantity of intoxicating liquor containing more than one-half of one per cent of alcohal, to-wit: one pint of a certain spiritous liquor, commonly known as "moonshine whiskey," the same being designed, intended and fit for use as a beverage, the sale of same being then and there prohibited and unlawful and contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

COUNT THREE.

(Nuisance.)

That Ruth Hazelton, late of the County of Nez Perce, State of Idaho, heretofore, to-wit: between

June 1, 1922, and December 1, 1922, at Lewiston, Idaho, in the said County of Nez Perce in the Central Division of the District of Idaho, and within the jurisdiction of this Court did then and there wilfully, knowingly and unlawfully maintain and keep and operate the Central Hotel, located on Lot 3 of Block 30 in the said City of Lewiston, Nez Perce County, Idaho, as a public and common nuisance as a place wherein intoxicating liquors containing more than one-half of one per cent of alcohol, to-wit: certain spiritous liquors commonly known as "moonshine whiskey," the same being designed, intended and fit for use as a beverage, were sold, kept and bartered, the said acts and things herein charged being then and there prohibited and unlawful and contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

E. G. DAVIS,
United States Attorney for
the District of Idaho.

We direct the attention of this Court to the fact that the time for the commission of the alleged facts set forth in the first two Counts is November 6th, 1922, and in the third Count the time is fixed as between June 1, 1922, and December 1, 1922.

The jury acquitted on the first and second Counts and found the defendant guilty on the third. At the outset, we take the position that the acquittal of the plaintiff in error on the first and second Counts and her conviction on the third Count creates such an inconsistency as requires a reversal of the judgment. While we appreciate the fact that the Federal Courts have frequently held that an acquittal of defendant on counts of possession and sale and a conviction on a count of maintaining a nuisance does not necessarily create an inconsistency in the verdict, we do contend that an inconsistency does arise in those cases where the acts embraced in the Counts of possession and sale must necessarily be established before a conviction may follow on the third Count, that of maintaining a nuisance. We are convinced that a careful reading of the entire record in this case leads irrevocably to the conclusion that the government manifestly relied on the evidence of the Prohibition Agent, Mr. Marler, to secure a conviction on all of the Counts set forth.

We proceed now to a discussion of the testimony of this gentleman. The substance of this testimony is as follows:

That he saw the defendant at the Central Hotel, at Lewiston, Idaho, on the 6th day of November. 1922. He fixed the time of his visit about noon of that day, at which time he testified she sold him a pint of moonshine whiskey. His cross-examination developed that he had never seen her prior to November 6th, but he is arbitrarily emphatic in his identification of her on that day. His testimony develops the strange proposition that he made no report of this transaction to his officials until about a month later, but immediately following the purchase of this liquor he filed a complaint against one Joyce Black, whom it will be shown later was operating the hotel at the time of his visit. This complaint was based upon the sale of the identical bottle that it is claimed he purchased from the plaintiff in error. The unreliability of his testimony further appears when it is considered that at the preliminary hearing held on the 5th day of December, the complaint on which the charge was based placed the commission of the offence on the 20th day of November. As we have heretofore stated, Marler was positive in his identification of

Mrs. Hazelton as being the person who sold him the liquor on the 6th day of November. He is primarily contradicted by the plaintiff in error who testified and proved conclusively that she was not in Lewiston and her testimony in this regard is corroborated by that of one Frances Jones, a maid in the hotel, also by the testimony of her husband.

The record is absolutely conclusive on the proposition that Mrs. Hazelton was not in Lewiston on the 6th day of November at the time Marler claims that he was at the Central Hotel. She and her husband had returned from a month's trip to the East, and arrived at Lewiston on the 5th day of November. In the forenoon of November 6th, and between nine and ten o'clock, they started in an automobile for Colton, Washington. They did not return to Lewiston until mid-afternoon. The government did not in any manner seek to contradict this testimony and it stands as a positive and substantial denial of the statement of the prohibition agent.

The testimony of Frances Jones, a witness for the plaintiff in error, which supports this proposition is as follows:

Q. State your name.

A. Frances Jones.

Q. Where do you reside, Mrs. Jones?

A. 227 Seventh Street, Lewiston, Idaho.

Q. About how long have you lived in Lewiston?

A. Pretty near three years.

Q. Were you acquainted with Mrs. Ruth Hazelton, the defendant in this case?

A. I am.

Q. About how long have you known her?

A. I guess about two and one-half years, just about.

Q. Do you work for her?

A. Yes, I do.

Q. In what capacity?

A. Maid.

Q. How long have you worked for her?

A. Going on two years and a half.

Q. I direct your attention, Mrs. Jones, to the month of October and the fore part of November of 1922. Do you recall of Mrs. Hazelton having taken a trip east during the month of October, that period of time?

A. Yes.

Q. Who was in charge of the place at the time she left or while she was away?

A. Well, it was a lady that I called "Babe," knew as "Babe."

Q. Do you recall when Mrs. Hazelton returned from the trip east?

A. I think it was on Sunday.

Q. That would be on the 5th or 6th of November?

A. Yes.

Q. 1922?

A. Yes.

* * * *

Q. Were you in the court room this morning when Mr. Marler, the Federal Agent, was testifying as to having purchased a bottle of liquor up there at the Central Hotel?

A. Yes.

Q. Are you the only colored maid that there is there?

A. Yes.

Q. I will ask you if you recall the episode as testified to by Mr. Marler, of his being there and purchasing a bottle of liquor from Babe or Joyce Black, and also saying that Mrs. Hazelton was there, do you recall that testimony?

A. Yes.

Q. Was the woman that was there with Babe Black Mrs. Hazelton, the defendant?

A. No.

Q. Who was she?

A. Well, I don't know her name.

Q. Had she been around the hotel for some time?

A. Well yes, she had been there, she roomed there.

Q. What room was she in, do you recall?

A. Room 5. (R. p. 62-66.)

While it may at first blush appear that her testimony in this regard was discredited by her cross-examination wherein she stated that she did not see Mr. Marler, her subsequent testimony after Mr. Marler had been recalled to the stand for the purpose of her identification of him proves that this maid was in the hotel at the time that Mr. Marler made his visit and that she saw him in conversation with Joyce Black and the woman who occupied Room 5.

Without setting forth in full the testimony of the

plaintiff in error or her husband, we invite the Court's attention to the record thereon, from which it must be concluded that the plaintiff in error was not in fact at the hotel at the time of Marler's visit, and that his was a case purely of mistaken identity.

Testimony of Mr. Hazelton touching this question is as follows:

Q. What time, Mr. Hazelton, did you leave for the east?

A. The 6th or 7th of October, 1922.

Q. Who went with you?

A. My wife, Mrs. Hazelton.

Q. And what time did you return?

A. On the afternoon of the 5th of November, 1922.

Q. Now you were there on the 6th of November, 1922, the date that the defendant is accused of selling a bottle of whiskey?

A. The morning of the 6th, yes, sir.

Q. State to the jury what time you and Mrs. Hazelton left, if you did at all, to go some other place.

A. Between nine and ten o'clock.

Q. And who was with you.

A. Mrs. Hazelton.

Q. You and her alone?

A. Yes, sir.

Q. How did you go?

A. In my car.

Q. And where did you go to?

A. We started for Colton but we only got about two-thirds up the hill, the spiral highway.

Q. What was the reason you didn't go to Colton?

A. We had a breakdown.

Q. How long were you detained there?

A. About two and a half or three hours, somewhere around there, possibly four hours altogether.

* * * *

Q. Did you finally get to Lewiston?

A. Finally, yes, sir.

Q. And what time was it?

A. I imagine about between probably two and three; I can't tell exactly; it was in the afternoon. (R. p. 85-87.)

The testimony of the plaintiff in error, Mrs. Hazelton, of course, is to the same effect.

Despite the fact that the jury has acquitted on the first two Counts, those of possession and sale, we have seen fit to set forth the testimony above stated for the reason that an examination of other testimony introduced by the government which we shall presently come to will lend the view that the government's case must stand or fall on the testimony of the Prohibition Agent.

We now address ourselves to the testimony of Sadie Samuelson, which it undoubtedly will be argued, was sufficient in and of itself to sustain conviction on the third Count. The substance of her testimony is to the effect that she first saw the defendant some time in October or November, 1922. The lady is not at all specific. Her first visit to the Central Hotel was for the purpose of purchasing a rooming house from the plaintiff in error. She had never been there before. When she went into the Central Hotel she stated that three men were sitting in a room; that they were buying drinks and that they bought one for her. According to her further statement she was up there on another occasion but she does not testify that on this subse-

quent occasion she purchased any liquor or saw any being sold. She has no recollection of whom she first spoke to with reference to the fact that the plaintiff in error was selling liquor in this hotel. She stated that she never talked with any government officer and furthermore she went voluntarily from Spokane, Washington, to Moscow, Idaho, for the purpose of giving testimony for the government against Mrs. Hazelton without knowing what she was going to testify to. The four men whom she alleges were buying liquor there on the occasion of her first visit were one Walter Miller, Jake Miller, one Fred Fren, and man by the name of Munday. None of these parties with the exception of Jake Miller appeared as witnesses in the case, either for or against the government. Testifying for the plaintiff in error, Jake Miller positively denied that he was in the hotel at the occasion referred to by the witness and further stated that during the time he had been rooming there, which was a period of some six months, that he had never seen any liquor sold on the premises. He was well acquainted with the witness, Sadie Samuelson, having worked for her, and thus we have her testimony thoroughly discredited and impeached by one of the parties whom

she claims was present on the ocacsion of her first visit.

We ask the Court's careful consideration of the testimony of this witness, Sadie Samuelson, for the reason that it will be contended as set forth above that it justified a conviction on the third Count. There can be no question but that ill-feeling existed between herself and the plaintiff in error over the purchase of a rooming house. She had bought a rooming house from the plaintiff in error and had paid thereon two hundred dollars, giving her notes for the balance. She later became dissatisfied with the deal, claiming there was a dispute over the lease and demanded of the plaintiff in error the return of her two hundred dollars. A week prior to the trial in the City of Lewiston she told the plaintiff in error that if the two hundred dollars was not returned to her that she would make it hot for her. She had made frequent demands for the return of the sum and not having received her money she became incensed at Mrs. Hazelton and took the opportunity presented by this trial to settle an old score.

The unreliability of her testimony is further developed when we consider her vague ramblings as to these alleged vists to the Central Hotel. In her direct examination she stated that she was up there

on two or three different occasions and that liquor was sold on each occasion and that she was there the night before the plaintiff in error left for the east and had a drink at that time. On cross-examination she testified that there were only two occasions that she saw any liquor when up there. When the whole nature of her testimony is considered and the undoubted fact that she was looking for opportunity to vent her spleen against Mrs. Hazelton and this coupled with her impeachment by Jake Miller, it must be concluded that her testimony was lacking in any degree of credence that would entitle a jury to pass upon the same.

In order to bolster its case, the government then called one W. H. Grasty, who testified to the effect that on the 2d day of November he was in the Central Hotel at Lewiston; that at said time and place he saw the plaintiff in error, Ruth Hazelton, and that he took a drink that had been purchased from Ruth Hazelton by another party. In his direct examination he does not give the name of this gentleman who made the purchase, but amply states that he had met him once before and that on this occasion he had come into town from Pullman or Colfax "or somewheres down the line." He closed his direct examination by a statement that he him-

self had purchased liquor from Mrs. Hazelton three days prior to that time.

In his cross-examination it was developed that he believed the name of the man to be Mishler, but on that proposition he would not be positive.

Mr. Mishler, on being called to the stand, flatly contradicted this witness by stating that he not only was not with Grasty in the Central Hotel at the time the later testified to but that on no occasion had he ever purchased liquor from Mrs. Hazelton, nor did he ever see Grasty make such a purchase.

It is somewhat remarkable that the two witnesses, whom the government will undoubteedly urge, adduced facts sufficient to sustain conviction on the third Count, were flatly contradicted by the very parties whom they claim to have been with when the sales of liquor were consummated.

The force of this impeaching testimony is better appreciated by a quotation from the record thereon. Mishler, on being called as a witness for the plaintiff in error, testified as follows:

Q. What is your name?

A. Asa Mishler.

Q. What is your occupation, Mr. Mishler?

A. Farming.

Q. In November, 1922, where were you living?

A. In Pullman.

Q. Pullman?

A. Yes.

Q. You heard the testimony of one William H. Grasty this morning on the witness stand?

A. Yes, sir.

Q. Did you hear his testimony wherein he stated that you had been with him and you or he had purchased two drinks of moonshine whiskey from Mrs. Hazelton in the Central Hotel in November, 1922? Did you hear that testimony?

A. I did.

Q. Did any such thing as that happen?

A. Not that I seen.

Q. Did you purchase any liquor from Mrs. Hazelton?

A. No, sir.

Q. Did you ever see Grasty purchase any liquor from Mrs. Hazelton?

A. No, sir.

Q. Did you ever see anyone purchase any liquor from Mrs. Hazelton?

A. No, sir.

Q. Did you ever see her furnish liquor to anyone?

A. No, sir. (R. p. 80-81.)

Further concerning the testimony of Mr. Grasty the record develops the enlightening fact that the gentleman is an ex-convict, having served a term in the Oregon State Penitentiary for Grand Larceny. We submit that testimony from such an unreliable source, especially when contradicted and impeached by a reliable witness is worthy of no consideration whatever.

## ASSIGNMENTS OF ERROR.

### I.

The Court erred in sustaining the objection to the following question asked of the witness, W. H. Grasty:

"By Mr. Johnson: Q. You never stated to them that you had bought any liquor or that you were present when any liquor was sold?"

II.

The Court erred in permitting Eugene Gasser to testify as to the records of the Police Court in connection with an alleged arrest of the defendant, Ruth Hazelton.

III.

The Court erred in permitting any evidence in reference to the defendant, Ruth Hazelton, having been arrested by the police of the City of Lewiston and in reference to any alleged beer.

IV.

The Court erred in submitting the case to the jury for the reason that there was a want of evidence to sustain a verdict and in failing to instruct the jury to find for the defendant.

ARGUMENT.

The first three Assignments of Error go to the question as to whether or not a review should be granted by the Appellate Court. We discuss these errors together.

The question on which the first Assignment of Error was based was put for the purpose of showing that the witness, Grasty, had been promised immunity by the police at Lewiston if he would testify against the plaintiff in error.

Shortly after the 6th of November this gentleman had been arrested by the Lewiston police. Prior to the question embraced in the Assignment of Error he was asked the following questions:

> "Q. I will ask you whether or not it was only after the police made some promises to you in your own case that you stated that Mrs. Hazelton had sold you any liquor.
>
> "A. I do not remember just when I told that; I believe that it was after—they made no promises.
>
> "Q. It was after they led you to believe that your interests would be served by testifying against Mrs. Hazelton?
>
> "A. *In a way, yes.* They never came out and openly asked me that question."

Then followed the question upon which the Assignment of Error was based and to which the objection was sustained. And certainly it was proper for the protection of the defendant's rights that this witness should testify as to the fact of his never having made any statement to the police that Mrs. Hazelton had sold him liquor or that any liquor had been purchased when he was present. The question was impeaching in its nature. If the witness had answered the question in the negative the govern-

ment's case would have fallen flat for the reason that he would then on cross-examination have contradicted himself. If he answered the question in the affirmative the way would have been open for rebuttal of his testimony in this regard. Clearly, this is Error that should justify the granting of a new trial.

Concerning the second Assignment of Error, the witness Eugene Gasser, was the Chief of Police of the City of Lewiston. He testified that he searched the hotel in 1922 somewhere around June 21st, that he found fourteen pints of beer therein, and that he arrested the defendant. He was permitted to testify from a police record that Mrs. Hazelton had been convicted on the charge of running a disorderly house. This upon her own plea of guilty. This was erroneous for two reasons. First, the record, itself, was not properly admissible and secondly the admission of testimony to the effect that she had conducted a disorderly house would in no manner support the view that she had been maintaining a nuisance as defined by the statute. If such testimony were admissible for any purpose, it would be to establish a continuity of similar offenses. It must be apparent, however, that the offense of con-

ducting a disorderly house is not similar to an offense wherein it is charged one is maintaining a nuisance by conducting a hotel or rooming house where intoxicating liquor is sold. Examination of the record will show that this testimony failed in any manner to prove any of the issues in the case and that its effect could have been nothing but highly prejudicial upon the jury.

The third Assignment of Error arises out of the testimony of the witness for the government, Eugene Gasser, Chief of Police of the City of Lewiston, and the witness, George W. Welker, Sheriff of Nez Perce County. Both of these men testified as to having made a search of the Central Hotel in June, 1922, and finding therein fourteen pints of beer. Their examination developed that neither of them were able to testify that the so-called beer was of alcoholic content. No analysis of the same was made and both of them after having smelled and tasted it were unable to tell what it was. Certain it is that if this had been beer and of alcoholic content within the provision of the statute the charge of running a disorderly house would never have been placed against the plaintiff in error. She would immediately have been charged under the State law with liquor in possession.

While it is true that the trial court struck the testimony of the Sheriff insofar as the same intended to prove that the beer was actually intoxicating liquor it was highly prejudicial to the rights of the plaintiff in error to have permitted testimony of this kind to have been paraded before the jury. It simply is another evidence of the manner in which the government grasped at straws in order to bring about the conviction of Mrs. Hazelton.

It will be observed that the information as set forth in the third Count, fixed the period of time between June and December, 1922. If the third Count is to be established at all it must be on the testimony of Marler or the testimony of the witnesses, Samuelson and Grasty. The jury by their verdict has shown that there was no possession of liquor or sale of the same by this plaintiff in error on the 6th day of November. The testimony of the witnesses, Gasser and Welker, proves nothing except the futile attempt of the government to present a mass of prejudicial testimony before the jury. The testimony of witnesses, Samuelson and Grasty, has been flatly contradicted and impeached. It has been proven that Mrs. Samuelson was actuated by a desire of revenge; that Grasty was testifying under the promise of immunity.

This brings us to the last Assignment of Error, namely, the want of evidence to sustain a verdict. All of the discussion which has gone before shows conclusively the lack of such evidence. It is the settled practice in the Supreme Court of the United States that want of evidence to sustain a verdict may be considered as grounds for reversal, although no motion or reqeust was made in the lower court to instruct the jury to find for the defendant.

*Weiborg vs. U. S.*, 41 Law Edition, 289.

The above case, which was one of extreme importance, involved a violation of the neutrality laws. The Supreme Court of the United States reviewed the testimony and held it insufficient to sustain the verdict. A reading of that case shows that a much stronger case was presented from an evidentiary standpoint than the one at bar.

Again in the case of *Clyatt vs. U. S.*, 49 Law Edition, 726, the same being a criminal case, the testimony was reviewed by the Supreme Court and the verdict set aside for insufficiency. The opinion contains the following language:

> "No matter how severe may be the condemnation which is due to the conduct of a party charged with a criminal offense, it is the im-

> perative duty of a Court to see that all of the elements of his crime are proved or at least that testimony is offered which justifies the jury in finding those elements. Only in the exact administration of law will justice in the long run be done and the confidence of the public in such administration be maintained."

In *Harrison vs. U. S.,* Cir Ct. Ap. 6th Cir, 200 Federal, 662, the Court reviewed a mail fraud case upon the facts and the law and after quoting from the opinion of Justice Brewer in the Clyatt case reversed the judgment of the lower court upon the insufficiency of the testimony and among other things quoted Judge Sanborn, speaking for the Circuit Court of Appeals of the 8th Circuit, 173 Federal, at 740, said:

> "Where all the substantial evidence is as consistent with innocence as with guilt it is the duty of the Appellate Court to reverse the judgment of conviction."

Only a fair and careful reading of these cases will show the application and the attitude of the Court in cases of this kind. The case at bar presents such a striking resemblance as pointed out in the foregoing illustrations that further citation is unnecessary in order to show the utter absurdity in maintaining the judgment in the present case.

An ordinary analysis of the testimony in the case at bar shows that there is a total absence of any well defined issue of fact upon which a jury should be called to pass and no substantial or credible evidence upon which to sustain judgment of the Court.

The Federal Courts have long ago discarded the scintilla of evidence rule and have held time and again that a mere scintilla of evidence is insufficient even in a civil case, much less therefore should it be sufficient in a criminal action, especially where the jurors are instructed and are required before they can convict to believe the defendant guilty beyond a reasonable doubt. This Court must say as a matter of law using its reasoning power and its experience in the law, that there is at least a reasonable doubt as to the innocence or guilt of the defendant and the jury should have so found.

There is in our mind no question of a doubt that if this Court feels that the verdict should not be set aside for lack of evidence that there is at least substantial error in the record to grant a new trial. The permissive introduction of the testimony of the Chief of Police and the Sheriff with reference to finding beer in this woman's hotel is alone sufficient

to justify the granting of a new trial. The instruction of the Court to the jury to disregard the evidence of Sheriff Welker insofar as it tended to prove that this beer was intoxicating liquor did not cure the error in refusing to sustain the objections directed towards the testimony of the Chief of Police on this ground. The jury might well have believed that they were entitled to accept his testimony to the effect that he believed this to be home brew and therefore intoxicating liquor, but even assuming that it was proved beyond doubt that this beer was actually intoxicating liquor the evidence would still be inadmissible for the reason that no attempt was made to show, nor does the third Count allege, that it was "kept" for the purpose of sale. The Federal Courts have held that where it does not appear and is not alleged by the government that intoxicating liquor is kept for the purpose of sale that the mere possession of the same is not sufficient to justify a conviction under the National Prohibition Act on the ground of maintaining a nuisance for the reason that the word "kept" as used in Section 21 of the Act refers to keeping for sale or for other commercial purposes.

*U. S. vs. One Cadillac Touring Car,* 274 Federal, 470.

We submit upon the whole record that the insufficiency of the evidence in this case presents to this Court a pure question of law for its decision. If we be not sound in this contention we earnestly urge the merit of the argument touching the question of a new trial and are confident that no other jury can be secured to convict upon the testimony of Sadie Samuelson, whose animosity towards the defendant has been proven beyond question and whose testimony has been impeached beyond contradiction nor upon the tesimony of Grasty, an ex-convict, who clearly testified under promises of immunity from punishment for an offense for which he stood charged and who likewise was impeached by the very party whom he claimed purchased the liquor.

Respectfully submitted,

CANNON & M'KEVITT,

*Attorneys for Plaintiff in Error.*

No. 4057

IN THE

# United States
# Circuit Court of Appeals
## For the Ninth Circuit

---

H. GOODFRIEND, JAMES D. AGNEW, SYLVESTER KINNEY, CARL H. SORENSON AND ED WARD,

*Plaintiffs in Error,*

VS.

UNITED STATES OF AMERICA,

*Defendant in Error.*

---

# Transcript of the Record

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*Upon Writ of Error from the United States District Court for the District of Idaho, Southern Division.*

---

SYMS-YORK CO., PRINTERS & BINDERS, BOISE

No.....

IN THE

# United States

# Circuit Court of Appeals

## For the Ninth Circuit

---

H. GOODFRIEND, JAMES D. AGNEW, SYLVESTER KINNEY, CARL H. SORENSON AND ED WARD,

*Plaintiffs in Error,*

VS.

UNITED STATES OF AMERICA,

*Defendant in Error.*

---

# Transcript of the Record

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*Upon Writ of Error from the United States District Court for the District of Idaho, Southern Division.*

*Names and Addresses of Attorneys of Record*

---

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*In the District Court of the United States, in and for the District of Idaho, Southern Division*

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No. 935

INDICTMENT

CHARGE: *Conspiracy to commit an offense against the United States; violation Section 37, Federal Penal Code. Violation of Sections 3258, 3281 and 3282, R. S.*

---

UNITED STATES OF AMERICA,

*Plaintiff,*

vs.

H. GOODFRIEND, JAMES D. AGNEW, SYLVESTER KINNEY, HENRY GRIFFITH, ED HILL, CARL H. SORENSON, EDITH SORENSON, ED KEMP, ED WARD AND J. H. EVANS,

*Defendants.*

The Grand Jurors of the United States of America, being first duly impaneled and sworn, in and for the District of Idaho, Southern Division, in the name and by the authority of the United States of America, upon their oaths, do find and present:

That on or about the first day of December, 1922, and continuously from on or about that day to the date of the return of this indictment into open Court, and therefore continuously from on or about the 1st day of December, 1922, to the 12th day of February, 1923, in the city of Boise, County of Ada, State of Idaho, Southern Division, and within the jurisdiction of this Court, one H. Goodfriend, one James D. Agnew,

one Sylvester Kinney, one Henry Griffiths, one Ed Hill, one Carl H. Sorenson, one Edith Sorenson, one Ed Kemp, one Ed Ward, one J. H. Evans, and others to the Grand Jury unknown, did then and there wilfully, knowingly, unlawfully and feloniously conspire, combine, federate and agree together and among themselves, to commit a certain offence against the United States of America, to-wit: to wilfully knowingly and unlawfully have and possess for sale for beverage purposes, certain intoxicating liquor containing more than one-half of one per cent of alcohol, to-wit: certain spirituous liquors commonly known as "moonshine whiskey", the amount being to the Grand Jury unknown the said "moonshine whiskey" to be designed, intended and fit for use as a beverage, the possession of same to be in a manner and at a time and place by the law of the United States prohibited and made unlawful.

1. That according to, in pursuance and furtherance of, said wilfull, unlawful and felonious conspiracy, confederacy, combination and agreement, and to accomplish the purpose and effect the object thereof, two of the said defendants, to-wit: Carl Sorenson and Edith Sorenson, on or about the 10th day of January, 1923, at that certain rooming house commonly known as the Vernon Hotel, located at 1009½ Main Street, Boise, Ada County, Idaho, and within the Southern Division and within the jurisdiction of this Court, did then and there obtain and have in their possession certain intoxicating liquor containing more than one-half of one per cent of alcohol, to-wit, about three quarts of a certain spirituous liquor commonly known

as "moonshine whiskey", the same being designed, intended and fit for use as a beverage, and the possession of same being then and there prohibited and unlawful.

2. That according to, in pursuance and furtherance of, said wilfull, unlawful and felonious conspiracy, confederacy, combination and agreement, and to accomplish the purpose and effect the object thereof, on or about the 10th day of January, 1923, one of the said defendants, to-wit, Edith Sorenson, having then and been there arrested for a violation of the National ProhibitionAct and having then and there been taken before John Jackson, a United States Commissioner for the Southern Division of the District of Idaho, residing at Boise, Idaho, and the bond of the said defendant, Edith Sorenson, having been fixed in the sum of $500 and the said defendant, Edith Sorenson, having been committed to jail in default of said bond, the said defendant, H. Goodfriend, and Sylvester Kinney, at Boise, Ada County, Idaho, did then and there furnish, supply and place with the said John Jackson, $500 in money as bond for the said Edith Sorenson.

3. That according to, in pursuance and furtherance of, said wilful, unlawful and felonious conspiracy, confederacy, combination and agreement, and to accomplish the purpose and effect the object thereof, one of the said defendants, to-wit: Ed Kemp, on or about the 15th day of January, 1923, on or near what is known as the J. H. Evans ranch, located about two miles in a southerly direction from the city of Boise, Ada County, Idaho, did then and there wilfully, knowingly and unlawfully have in his possession five gallons of a cer-

tain intoxicating liquor containing more than one-half of one per cent of alcohol, to-wit, a certain spirituous liquor commonly known as "moonshine whiskey", the same being designed, intended and fit for use as a beverage, the possession of same being then and there prohibited and unlawful.

4. That according to, in pursuance and furtherance of, said wilful, unlawful and felonious conspiracy, confederacy, combination and agreement, and to accomplish the purpose and effect the object thereof, one of the said defendants, to-wit: Ed Kemp, on or about the 15th day of January, 1923, on or near what is known as the J. H. Evans ranch, located about two miles in a southerly direction from the city of Boise, Ada County, Idaho, did then and there wilfully, knowingly and unlawfully manufacture a certain intoxicating liquor containing more than one-half of one per cent of alcohol, to-wit: about 45 gallons of a certain spirituous liquor commonly known as "moonshine whiskey", the same being designed, intended and fit for use as a beverage, the manufacture of same being then and there prohibited and unlawful.

5. That according to, in pursuance and furtherance of, said wilful, unlawful and felonious conspiracy, confederacy, combination and agreement, and to accomplish the purpose and effect the object thereof, one of the said defendants, to-wit: Ed Kemp, on or about the 15th day of January, 1923, on or near what is known as the J. H. Evans ranch, located about two miles in a southerly direction from the city of Boise, Ada County, Idaho, did then and there have in his

possession property designed for the manufacture of intoxicating liquor, and intended to be used for the manufacture of intoxicating liquor, to-wit: one complete still, having a capacity of about thirty gallons; one ten-gallon keg; one felt sack; ten 52-gallon barrels of mash; one wash boiler; one vase; three funnels; one proof tester and box; one agate iron dipper; one wrench; one screw driver; one 5-gallon can; one galvanized bucket; one pan; eight 5-gallon kegs; one 5-gallon pressure tank and burner; one pump; one copper can; one 6-gallon stone jar; one empty 5-gallon stone jug; one 3-gallon stone jar; one two-burner oil stove; one four-burner oil stove; one sack of charcoal; two 15-gallon copper stills; one coil and several pieces of copper coil.

6. That according to, in pursuance and furtherance of, said wilful, unlawful and felonious conspiracy, confederacy, combination and agreement, and to accomplish the purpose and effect the object thereof, the said defendant, Ed Kemp, having been on or about the 15th day of January 1923, arrested on a charge of violating the National Prohibition Act, and having been taken before John Jackson, a United States Commissioner, for the District of Idaho, Southern Division, residing at Boise, Ada County, Idaho, and the bond of the said Ed Kemp having been set by the said John Jackson, in the sum of $1000 and said Ed Kemp having been confined to jail in default of said bond, and the said Ed Kemp being and remaining in jail in default thereof, on the 16th day of January, 1923, the said defendant, H. Goodfriend, did then and there, to-wit:

on the 16th day of January, 1923, at Boise, Ada County, Idaho, furnish, post and supply with the said John Jackson, a United States Commissioner, as aforesaid, $1,000 in cash as bond money for the said Ed Kemp, and did then and there secure the release of the said Ed Kemp from custody.

7. That according to, in pursuance and furtherance of, said wilful, unlawful and felonious conspiracy, confederacy, combination and agreement, and to accomplish the purpose and effect the object thereof, the said defendant, Carl Sorenson, having been, on the 26th day of January, 1923, at the city of Boise, County of Ada, State of Idaho, arrested on a bench warrant issued out of the United States District Court for the District of Idaho, on a charge of violating the National Prohibition Act, and the bond of the said Carl Sorenson having been set in the sum of $1,000, and the said Carl Sorenson having been confined to jail in default of said bond and being in jail in default thereof, one of the said defendants, H. Goodfriend, did then and there become and be one of the bondsmen for the said Carl Sorenson, by then and there entering upon and signing a bond for the said Carl Sorenson, and therein and thereby aiding and assisting in procuring the release of the said Carl Sorenson from jail.

Contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

COUNT TWO

And the Grand Jurors, aforesaid, upon their oaths, as aforesaid, do further find and present:

That on or about the 1st day of December, 1922, and continuously from on or about that day to the date of the return of this indictment into open Court, and therefore continuously from on or about the 1st day of December, 1922, to the 12th day of February, 1923, in the city of Boise, County of Ada, State of Idaho, Southern Division of the District of Idaho, and within the jurisdiction of this Court, H. Goodfriend, James D. Agnew, Sylvester Kinney, Henry Griffiths, Ed Hill, Carl H. Sorenson, Edith Sorenson, Ed Kemp, Ed Ward, J. H. Evans, and others to the Grand Jury unknown, did then and there wilfully, knowingly, unlawfully and feloniously conspire, combine, confederate and agree together and among themselves to commit a certain offense against the United States of America, to-wit, to wilfully, knowingly and unlawfully engage in the business of selling at retail and wholesale for beverage purposes, certain intoxicating liquors containing more than one-half of one per cent of alcohol, to-wit, certain spirituous liquor commonly known as "moonshine whiskey", the said "moonshine whiskey" to be designed, intended and fit for use as a beverage, the sale of the same to be in a manner and at a time and place by the law of the United States prohibited and made unlawful.

1. That according to, in pursuance and furtherance of, said wilful, unlawful and felonious conspiracy, confederacy, combination and agreement, and to accom-

plish the purpose and effect the object thereof, two of the said defendants, to-wit: Carl Sorenson and Edith Sorenson, on or about the 10th day of January, 1923, at that certain rooming house commonly known as the Vernon Hotel, located at 1009½ Main Street, Boise, Ada County, Idaho, and within the Southern Division of the District of Idaho, and within the jurisidction of this Court did then and there obtain and have in their possession certain intoxicating liquor containing more than one-half of one per cent of alcohol, to-wit, about three quarts of a certain spirituous liquor commonly known as "moonshine whiskey", the same being designed, intended and fit for use as a beverage, the possession of same being then and there prohibited and unlawful.

2. That according to, in pursuance and furtherance of, said wilful, unlawful and felonious conspiracy, confederacy, combination and agreement, and to accomplish the purpose and effect the object thereof, on or about the 10th day of January, 1923, one of the said defendants, to-wit: Edith Sorenson, having then and there been arrested for a violation of the National Prohibition Act and having then and there been taken before John Jackson, a United States Commissioner for the Southern Division of the District of Idaho, residing at Boise, Idaho, and the bond of said defendant, Edith Sorenson, having been fixed in the sum of $500 and the said defendant, Edith Sorenson, having been committed to jail in default of said bond, the said defendants, H. Goodfriend and Sylvester Kinney, at Boise, Ada County, Idaho, did then and there furnish, supply

and place with the said John Jackson, $500 in money as bond for the said Edith Sorenson.

3. That according to, in pursuance and furtherance of, said wilful, unlawful and felonious conspiracy, confederacy, combination and agreement, and to accomplish the purpose and effect the object thereof, one of the said defendants, to-wit, Ed Kemp, on or about the 15th day of January, 1923, on or near what is known as the J. H. Evans ranch, located about two miles in a southerly direction from the city of Boise, Ada County, Idaho, did then and there wilfully, knowingly and unlawfully have in his possession five gallons of a certain intoxicating liquor containing more than one-half of one per cent of alcohol, to-wit, a certain spirituous liquor commonly known as "moonshine whiskey", the same being designed, intended and fit for use as a beverage, the possession of same being then and there prohibited and unlawful.

4. That according to, in pursuance and furtherance of, said wilful, unlawful and felonious conspiracy, confederacy, combination and agreement, and to accomplish the purpose and effect the object thereof, one of the said defendants, to-wit: Ed Kemp, on or about the 15th day of January, 1923, on or near what is known as the J. H. Evans ranch located about two miles in a southerly direction from the city of Boise, Ada County, Idaho, did then and there wilfully, knowingly and unlawfully manufacture a certain intoxicating liquor containing more than one-half of one per cent of alcohol, to-wit, about 45 gallons of a certain spirituous liquor commonly known as "moonshine whiskey",

the same being designed, intended and fit for use as a beverage, the manufacture of the same being then and there prohibited and unlawful.

5. That according to, in pursuance and furtherance of, said wilful, unlawful and felonious conspiracy, confederacy, combination and agreement, and to accomplish the purpose and effect the object thereof, one of the said defendants, to-wit: Ed Kemp, on or about the 15th day of January, 1923, on or near what is known as the J. H. Evans ranch, located about two miles in a southerly direction from the city of Boise, Ada County, Idaho, did then and there, have in his possession property designed for the manufacture of intoxicating liquor and intended to be used for the manufacture of intoxicating liquor to-wit: one complete still, having a capacity of about thrity gallons; one ten-gallon keg; one felt sack; ten 52-gallon barrels of mash; one wash boiler; one vase; three funnels; one proof tester and box; one agate iron dipper; one wrench; one screw driver; one 5-gallon pan; one galvanized bucket; one pan; eight 5-gallon kegs; one 5-gallon pressure tank and burner; one pump; one copper can; one 6-gallon stone jar; one empty 5-gallon stone jug; one 3-gallon stone jar; one two-burner oil stove; one four-burner oil stove; one sack of charcoal; two 15-gallon copper stills; one coil and several pieces of copper coil.

6. That according to, in pursuance and furtherance of, said wilful, unlawful and felonious conspiracy, confederacy, combination and agreement, and to accomplish the purpose and effect the object thereof, the

said defendant, Ed Kemp, having been on or about the 15th day of January, 1923, arrested on a charge of violating the National Prohibition Act, and having been taken before John Jackson, a United States Commissioner for the District of Idaho, Southern Division, residing at Boise, Ada County, Idaho, and the bond of the said Ed Kemp having been set by the said John Jackson in the sum of $1,000, and said Ed Kemp having been confined to jail in default of said bond, and the said Ed Kemp being and remaining in jail in default thereof, on the 16th day of January, 1923, the said defendant, H. Goodfriend, did then and there, to-wit, on the 16th day of January, 1923, at Boise, Ada County, Idaho, furnish, post and supply with the said John Jackson, a United States Commissioner, as aforesaid, $1,000 in cash as bond money for the said Ed Kemp, and did then and there secure the release of the said Ed Kemp from custody.

7. That according to, in pursuance and furtherance of, said wilful, unlawful and felonious conspiracy, confederacy, combination and agreement, and to accomplish the purpose and effect the object thereof, the said defendant, Carl Sorenson, having been, on the 26th day of January, 1923, at the City of Boise, County of Ada, State of Idaho, arrested on a bench warrant issued out of the United States District Court for the District of Idaho, on a charge of violating the National Prohibition Act, and the bond of the said Carl Sorenson having been set in the sum of $1,000 and the said Carl Sorenson having been confined to jail in default of said bond, and being in jail in default thereof, one

of the said defendants, H. Goodfriend, did then and there become and be one of the bondsmen for the said Carl Sorenson, by then and there entering upon and signing a bond for the said Carl Sorenson, and therein and thereby aiding and assisting in procuring the release of the said Carl Sorenson from jail.

Contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

COUNT THREE

And the Grand Jurors, aforesaid, upon their oaths, as aforesaid, do further find and present:

That on or about the 1st day of December, 1922, and continuously from on or about that day to the day of the return of this indictment into open Court, and therefore continuously from on or about the 1st day of December, 1922, to the 12th day of February, 1923, in the city of Boise, County of Ada, state of Idaho, Southern Division of the District of Idaho, and within the jurisdiction of this Court, H. Goodfriend, James D. Agnew, Sylvester Kinney, Henry Griffiths, Ed Hill, Carl H. Sorenson, Edith Sorenson, Ed Kemp, Ed Ward, J. H. Evans, and others to the Grand Jury unknown, did then and there wilfully, knowingly, unlawfully and feloniously conspire, combine, confederate and agree together and among themselves, to commit a certain offense against the United States of America, to-wit, to wilfully, knowingly and unlawfully manufacture, for beverage purposes, certain intoxicating liquors containing more than one-half of one per cent

of alcohol, to-wit: certain spirituous liquor commonly known as "moonshine whiskey" the amount being to the Grand Jury unknown, the said "moonshine whiskey" to be designed, intended and fit for use as a beverage, the manufacture of same to be in a manner and at a time and place by the law of the United States prohibited and made unlawful.

1. That according to, in pursuance and furtherance of, said wilful, unlawful and felonious conspiracy, confederacy, combination and agreement, and to accomplish the purpose and effect the object thereof, two of the said defendants, to-wit: Carl Sorenson and Edith Sorenson, on or about the 10th day of January, 1923, at that certain rooming house commonly known as the Vernon Hotel, located at 1009½ Main Street, Boise, Ada County, Idaho, and within the Southern Division of the District of Idaho, and within the jurisdiction of this Court, did then and there obtain and have in their possession certain intoxicating liquors containing more than one-half of one per cent of alcohol, to-wit: about 3 quarts of a certain spirituous liquor commonly known as "moonshine whiskey" the same being designed, intended and fit for use as a beverage, the possession of same being then and there prohibited and unlawful.

2. That according to, in pursuance and furtherance of, said wilful, unlawful and felonious conspiracy, confederacy, combination and agreement, and to accomplish the purpose and effect the object thereof, on or about the 10th day of January, 1923, one of the said defendants, to-wit, Edith Sorenson, having then and

there been arrested for a violation of the National Prohibition Act and having then and there been taken before John Jackson, a United States Commissioner for the Southern Division of the District of Idaho, residing at Boise, Idaho, and the bond of the said defendant, Edith Sorenson, having been fixed in the sum of $500, and the said defendant, Edith Sorenson, having been committed to jail in default of said bond, the said defendants, H. Goodfriend and Sylvester Kinney, at Boise, Ada County, Idaho, did then and there furnish, supply and place with the said John Jackson, $500 in money as bond for the said Edith Sorenson.

3. That according to, in pursuance and furtherance of, said wilful, unlawful and felonious conspiracy, confederacy, combination and agreement, and to accomplish the purpose and effect the object thereof, one of the said defendants, to-wit: Ed Kemp, on or about the 15th day of January, 1923, on or near what is known as the J. H. Evans ranch, located about two miles in a southerly direction from the City of Boise, Ada County, Idaho, did then and there, wilfully, knowingly and unlawfully have in his possession five gallons of a certain intoxicating liquor containing more than one-half of one per cent of alcohol, to-wit: a certain spirituous liquor commonly known as "moonshine whiskey", the same being designed, intended and fit for use as a beverage, the possession of same being then and there prohibited and unlawful.

4. That according to, in pursuance and furtherance of, said wilful, unlawful and felonious conspiracy, confederacy, combination and agreement, and to accom-

plish the purpose and effect the object thereof, one of the said defendants, to-wit: Ed Kemp, on or about the 15th day of January, 1923, on or near what is known as the J. H. Evans ranch, located about two miles in a southerly direction from the City of Boise, Ada County, Idaho, did then and there wilfully, knowingly and unlawfully manufacture a certain intoxicating liquor containing more than one-half of one per cent of alcohol, to-wit: about 45 gallons of a certain spirituous liquor commonly known as "moonshine whiskey", the same being designed, intended and fit for use as a beverage, the manufacture of same being then and there prohibited and unlawful.

5. That according to, in pursuance and furtherance of, said wilful, unlawful and felonious conspiracy, confederacy, combination and agreement, and to accomplish the purpose and effect the object thereof, one of the said defendants, to-wit: Ed Kemp, on or about 15th day of January, 1923, on or near what is known as the J. H. Evans ranch, located about two miles in a southerly direction from the city of Boise, Ada County, Idaho, did then and there, have in his possession property designed for the manufacture of intoxicating liquor and intended to be used for the manufacture of intoxicating liquor, to-wit: one complete still, having a capacity of about thirty gallons; one ten-gallon keg; one felt sack; ten 52-gallon barrels of mash; one wash boiler; one vase; three funnels; one proof tester and box; one agate iron dipper; one wrench; one screw driver; one 5-gallon can; one galvanized bucket; one pan; eight 5-gallon kegs; one 5-gallon pressure tank

and burner; one pump; one copper can; one 6-gallon stone jar; one empty 5-gallon stone jug; one 3-gallon stone jar; one two-burner oil stove; one four-burner oil stove; one sack of charcoal; two 15-gallon copper stills; one coil and several pieces of copper coil.

6. That according to, in pursuance and furtherance of, said wilful, unlawful and felonious conspiracy, confederacy, combination and agreement, and to accomplish the purpose and effect the object thereof, the said defendant, Ed Kemp, having been on or about the 15th day of January, 1923, arrested on a charge of violating the National Prohibition Act, and having been taken before John Jackson, a United States Commissioner, for the District of Idaho, Southern Division, residing at Boise, Ada County, Idaho, and the bond of the said Ed Kemp having been set by the said John Jackson, in the sum of $1,000 and the said Ed Kemp having been confined to jail in default of said bond, and the said Ed Kemp being and remaining in jail in default thereof, on the 16th day of January, 1923, the said defendant H. Goodfriend, did then and there, to-wit: on the 16th day of January, 1923, at Boise, Ada County, Idaho, furnish, post and supply with the said John Jackson, a United States Commissioner, as aforesaid, $1,000 in cash as bond money for the said Ed Kemp, and did then and there secure the release of the said Ed Kemp from custody.

7. That according to, in pursuance and furtherance of, said wilful, unlawful and felonious conspiracy, confederacy, combination and agreement, and to accomplish the purpose and effect the object thereof, the

said defendant, Carl Sorenson, having been, on the 26th day of January, 1923, at the city of Boise, County of Ada, State of Idaho, arrested on a bench warrant issued out of the United States District Court for the District of Idaho, on a charge of violating the National Prohibition Act, and the bond of the said Carl Sorenson having been set in the sum of $1,000, and the said Carl Sorenson having been confined to jail in default of said bond and being in jail in default thereof, one of the said defendants, H. Goodfriend, did then and there become and be one of the bondsmen for the said Carl Sorenson, by then and there entering upon and signing a bond for the said Carl Sorenson, and therein and thereby aiding and assisting in procuring the release of the said Carl Sorenson from jail.

Contrary to the from of the statute in such case made and provided and against the peace and dignity of the United States of America.

## Count Four

And the Grand Jurors, aforesaid, upon their oaths, as aforesaid, do further find and present:

That H. Goodfriend, James D. Agnew, Sylvester Kinney, Henry Griffiths, Ed Hill, Carl H. Sorenson, Edith Sorenson, Ed Kemp, Ed Ward, and J. H. Evans, late of the County of Ada, State of Idaho, heretofore, to-wit, on or about the 15th day of January, 1923, near Boise, Idaho, in the County of Ada, in the Southern Division of the District of Idaho, within the jurisdiction of this Court, did then and there wilfully, knowingly, unlawfully and feloniously have in their

possession and custody, and under their control a certain still and distilling apparatus; to-wit, a still of about thirty gallons capacity, together with all necessary accessories, set up and ready for operation, without first having registered the same with the Collector of Internal Revenue for the District of Idaho, as required and provided by law.

Contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

COUNT FIVE

And the Grand Jurors, aforesaid, upon their oaths, as aforesaid, do further find and present:

That H. Goodfriend, James D. Agnew, Sylvester Kinney, Henry Griffiths, Ed Hill, Carl H. Sorenson, Edith Sorenson, Ed Kemp, Ed Ward, and J. H. Evans, late of the County of Ada, State of Idaho, heretofore, to-wit: on or about the 15th day of January, 1923, near Boise, Idaho, in the said County of Ada, in the Southern Division of the District of Idaho and within the jurisdiction of this Court, did then and there wilfully, knowingly, unlawfully and feloniously carry on the business of a distiller, without having given a bond as required by law, and did then and there engage in and carry on the business of a distiller with intent to defraud the United States of the tax on the spirits distilled by them.

Contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

COUNT SIX

And the Grand Jurors, aforesaid, upon their oaths, as aforesaid, do further find and present:

That H. Goodfriend, James D. Agnew, Sylvester Kinney, Henry Griffiths, Ed Hill, Carl H. Sorenson, Edith Sorenson, Ed Kemp, Ed Ward, and J. H. Evans, late of the County of Ada, State of Idaho, heretofore, to-wit, on or about the 15th day of January, 1923, near Boise, Idaho, in the said County of Ada, in the Southern Division of the District of Idaho and within the jurisdiction of this Court, did then and there wilfully, knowingly, unlawfully and feloniously make and ferment in a building and on premises other than a distillery, duly authorized according to law, 500 gallons of mash, wort and wash, fit for distillation, and designed and intended for the production of spirits and alcohol.

Contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

E. G. DAVIS,
*United States District Attorney for the District of Idaho.*

RUSSELL M. ASH,
*Foreman of the United States Grand Jury.*

*Witnesses Examined Before the Grand Jury in the Above Case*

O. E. Kuckenbecker
Wm. H. Kingsley
Henry R. Aikman
H. S. Briggs
Paul Reynolds
A. E. Taylor
John Jackson
Mrs. Marie Curtis
John McEvers

Endorsed. Filed February 12, 1923.
W. D. McReynolds, Clerk.

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(Title of Court and Cause.)

*Minute Entry of February 13, 1923.*

ARRAIGNMENT OF DEFENDANTS

Comes now the District Attorney with the defendant, H. Goodfriend, and his counsel, J. R. Smead, Esq., the defendant, James Agnew, with his counsel, Messrs. Hawley & Hawley; the defendant Sylvester Kinney, and his counsel, Claude Gibson, Esq.; the defendant Henry Griffiths, with his counsel, P. E. Cavaney, Esq.; the defendant, Ed Hill, with his counsel, Messrs. Martin & Martin, and the defendants Carl Sorenson, Edith Sorenson, Ed Kemp and Ed Ward, without counsel, all of said defendants to be arraigned upon the indictment. The reading of the indictment was waived by each of the defendants, who were informed of the contents thereof by the Court. The Court asked each of the defendants if the name by which he was indicted was his true name, and each replied in the affirmative. Two o'clock P. M. on February 14th, 1923, was fixed as time for the defendants to plead to the indictment.

*Minute Entry of February 14th, 1923.*

PLEAS OF DEFENDANTS

Comes now the District Attorney with the defendants and their respective counsel into Court. this being the time for them to plead.

The Court asked each defendant whether his plea was guilty or not guilty, and each pleaded not guilty. Ten o'clock A. M. on February 26th, 1923, was fixed as time to try said cause.

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(Title of Court and Cause.)

No. 935

STIPULATION

It is hereby stipulated by and between the plaintiff above named and the defendants Carl Sorenson and Edith Sorenson, by their respective counsel of record herein, that the petition, affidavits, transcripts of testimony, and all other parts of the record, including the minute entries connected therewith and the opinion and decision of the Court therein, in the matter of the petition of Carl Sorenson and Edith Sorenson to have declared illegal a certain search and to have a certain search warrant and showing therefore declared insufficient and to have certain property taken by said search returned to the said Carl Sorenson, which petition was filed in the case of United States vs. Carl Sorenson, and Edith Sorenson in the above entitled Court, be considered, and is hereby made, a part of the record of

the above entitled cause and of the proceedings had therein and the trial thereof.

E. G. DAVIS,
*United States Attorney.*
JOHN H. McEVERS,
*Assistant United States Attorney.*

W. H. LANGROISE,
*Attorney for Defendants, Carl Sorenson and Edith Sorenson*

Approved. Dietrich, Judge. Feb. 26, 1923.
Endorsed. Filed February 26, 1923.
W. D. McReynolds, Clerk.

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*In the District Court of the United States in and for the District of Idaho, Southern Division.*

PETITION OF CARL SORENSON AND EDITH SORENSON, DEFENDANTS

THE UNITED STATES OF AMERICA,
*Plaintiff,*
vs.
EDITH SORENSON and CARL SORENSON,
*Defendants.*

Comes now Carl Sorenson, and Edith Sorenson, defendants above named, and represent to the said Court as follows:

I

That on or about the 10th day of January, A. D. 1923, Elias Marsters, Federal Prohibition Agent for Idaho, and certain other Federal Prohibition Agents acting under his direction, to-wit, C. B. Steunenberg, Paul E. Reynolds, O. K. Nickerson, and one Wagoner, whose full name is to these petitioners unknown, made a search of certain premises, the same being an apartment in the Vernon Hotel, situated in Boise, Idaho, and within the above named district and division; that said officers made said search in their said official capacities, and in so doing purported to act pursuant to, and by virtue of, a certain search warrant issued by a United States Commissioner, a copy of which warrant is hereunto attached and is by this reference made a part hereof;

II

That said search warrant was unlawfully issued in this, that it purports to authorize the entry and search of the rooms occupied by one Edith Sorenson, and was issued without any showing of fact whatever giving or affording probable cause to believe that the rooms so occupied by said Edith Sorenson were being used for the unlawful sale of intoxicating liquor, or that said rooms were in any part used for some business purposes such as a store, shop, saloon, restaurant, hotel or boarding house; that the sole showing, proof and evidence offered and supplied to said commissioner for the purpose of procuring said search warrant and the only showing made to said commissioner upon the strength of which he issued said search warrant as aforesaid,

consisted of an affidavit made before him by the said Paul E. Reynolds, a copy of which affidavit is hereunto attached and is by this reference made a part hereof;

III

That these petitioners are husband and wife, and have been so since a time long prior to the said date of said search; that on the day of said search, and for a long time prior thereto, they and the son of defendant Edith Sorenson, as a family of which the said Carl Sorenson was the head, used and occupied, not transiently but continuously and solely as their private family residence, a certain group of rooms in the said Vernon Hotel, consisting of a dining room, a kitchen, the room of said petitioners used as a bed room and as a living room and the bed room of said son; that said rooms have been put to no other use, and were not at any time while so occupied by these petitioners; that the same have been so occupied and used ever since said search; that on the date and day aforesaid, in the absence of said Carl Sorenson, the aforesaid officers came to the said hotel, and without the consent or acquiescence of petitioners or either of them, entered the aforesaid rooms used as aforesaid as the residence of said family, and proceeded to search the said dining room, kitchen and the room of petitioners; that then and ever since said officers have claimed as their authority for so entering and searching said rooms, and have relied upon, the aforesaid search warrant; that said officers acted entirely without authority other than the authority purported to be extended to them through said search warrant; that in one of the said rooms, to-

wit: the bed room of petitioners, said officers, in the course of said search, seized and carried away certain property belonging to the said Carl Sorenson, to-wit: certain liquor claimed to be intoxicating, certain pitchers, certain glasses, and perhaps other items of property of little consequence or value; that said officers still retain possession of the same; that immediately upon seizing such property the defendant Edith Sorenson was placed under arrest and charged with unlawful possession of the liquor aforesaid; that a complaint embodying said charge has been filed before the United States Commissioner aforesaid, said defendant has been required to give bond for her appearance in the sum of Five Hundered Dollars, and has more recently been held to appear in this Court and answer to said charge on the first day of February, 1923, term thereof; that said property is retained and held as aforesaid for the purpose of using the same as evidence in said prosecution to be had in this Court; that information has been filed in this Court, charging these defendants jointly, with unlawful possession of liquor and with maintaining said hotel as a common nuisance, and defendant Carl Sorenson has been arrested and imprisoned on said charges;

IV

That the property so seized was and is the property of the petitioner Carl Sorenson, and not of the defendant Edith Sorenson; that said search and the seizure thereof were entirely unlawful and unwarranted, in this, that, as shown upon the face of said search warrant and as shown by the aforesaid affidavit, no showing

of any fact whatever was made to or before said commissioner for the purpose of procuring the issuance of such search warrant, and said search warrant was issued entirely upon a showing consisting of statements of hearsay and opinions of the affiant merely, and not upon any statement of matter legally to be considered as a statement of fact; and said search warrant was further unlawfully issued, and said showing therefore was further insufficient, in this, that no legal showing of any fact whatever was made to or before said commissioner for the purpose of procuring the said search warrant, which did or could legally or at all establish probable cause to believe that the aforesaid private dwelling of said family was being used for the unlawful sale of intoxicating liquor or that any part thereof was being used for some or any business purposes such as a store, shop, saloon, restaurant, hotel or boarding house; that said search and seizure was further unlawful, in this, that said officers had no search warrant authorizing the search of said private dwelling place, or any private dwelling;

WHEREFORE, Petitioners pray that the aforesaid entry and search of the aforesaid private dwelling be by this Court held and declared unlawful and unwarranted; that said search warrant be held and declared to have been insufficient in law to afford any authority whatever for the aforesaid search and the seizure of said property; that the said showing therefor be held insufficient for the issuance of said warrant or to authorize said search and seizure; that it be ordered and adjudged that the aforesaid property so seized be

returned to petitioner Carl Sorenson, except that if, in the opinion of this Court, the law does not permit of the return of said liquor or does not permit of the lawful possession thereof, the same be ordered destroyed.

J. R. SMEAD,
*Attorney for Petitioners.*

STATE OF IDAHO,
COUNTY OF ADA, } ss.

Carl Sorenson and Edith Sorenson, being first duly sworn, depose and say that all statements of fact contained in the foregoing petition are true.

(Signed) CARL SORENSON.
EDITH SORENSON.

Subscribed and sworn to before me this 29th day of January, A. D. 1923.

(Notarial Seal.)

E. G. ELLIOTT,
*Notary Public for Idaho,*
Residence: Boise, Idaho.

UNITED STATES OF AMERICA,
DISTRICT OF IDAHO,
SOUTHERN DIVISION, } ss.

*To Elias Marsters, Federal Prohibition Agent, and his deputies and agents, or any or either of them,* GREETING:

WHEREAS, Complaint on oath and in writing, supported by affidavits, has this day been made before me John Jackson, a United States Commissioner for said district, by Paul E. Reynolds, Federal Prohibition Agent, alleging that he has reason to believe, and does believe, that within a certain house, store, or building

in this district, to-wit: Room 207 of the Vernon Rooms located at No. 1009½ Main Street, Boise, Ada County, Idaho, and also the rooms occupied by Edith Sorenson and also the rooms under the management and control of the said Edith Sorenson in the said Rooming House, being the premises occupied by Edith Sorenson, there is located certain property, to-wit Moonshine Whiskey, which is being used as a means of committing a (misdemeanor), to-wit: a violation of the National Prohibition Act of the statutes of the United States;

AND WHEREAS, The particular grounds or probable cause for the issuance of this warrant and the names of the persons whose affidavits have been taken in support hereof are as follows: That the said Paul E. Reynolds has been recently informed through an absolutely authentic source and by a party in whom said affiant has absolute confidence, and whose name affiant does not care to divulge for official reasons, that the said party that informed the said affiant saw certain spirituous liquor containing more than one-half of one per cent of alcohol, to-wit, "Moonshine Whiskey" in the above described rooms; that affiant has reason to believe and does believe that intoxicating liquor, as defined by an Act of Congress approved October 28, 1919, known as the National Prohibition Act, the exact quantity being to the affiant unknown, is being unlawfully possessed, sold and used upon the above described premises.

AND WHEREAS The undersigned is satisfied of the existence of the grounds of the said application, or that there is probable cause to believe their existence,

YOU ARE THEREFORE HEREBY COMMANDED, In the name of the President of the United States, to enter said premises (in the day-time only) with the necessary and proper assistance, and forthwith search the same, for the property hereinbefore specified, and bring the same, if found, before the undersigned, and to report and act concerning the same as required of you by law.

WITNESS MY HAND AND SEAL This 10th day of January, 1923.

(SEAL) JNO. JACKSON,

*United States Commissioner as Aforesaid.*

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*Affidavit for Search Warrant Under National Prohibition Act.*

UNITED STATES OF AMERICA,
DISTRICT OF IDAHO,
SOUTHERN DIVISION, } ss.

BE IT REMEMBERED, That on this day before me, John Jackson, United States Commissioner for the District of Idaho, Southern Division, came Paul Reynolds, a duly qualified and acting Federal Prohibition Agent for the District of Idaho, who being duly sworn, deposes and says that because of the following facts, to-wit: that affiant has been recently informed through an absolutely authentic source and by a party in whom affiant has absolute confidence, and whose name affiant does not care to divulge for official reasons, that the said party that informed affiant, saw certain spirituous liquor containing more than one-half of one per cent of alcohol, to-wit: "moonshine whiskey" in Room 207

of the Vernon Rooms located at 1009½ Main Street, Boise, Idaho, and also that said party saw intoxicating liquor of the same description in a certain room in said rooming house occupied by Edith Sorenson and also in other rooms under her management and control connected with the said Rooming House; that affiant has reason to believe and does believe that intoxicating liquor, as defined by an Act of Congress approved October 28, 1919, known as the "National Prohibition Act", the exact quantity being to the affiant unknown, is being unlawfully possessed, sold and used upon the premises occupied by Edith Sorenson as a Rooming House and Hotel, situated in the city of Boise, State of Idaho, and within the District above named, the said premises being more fully described as follows: That certain premises known as the Vernon Rooms located at 1009½ Main Street, Boise Idaho, and in particular, the rooms thereof, which are directly under the management and control of the said Edith Sorenson and not subleased or let to any particular tenant.

PAUL REYNOLDS.

Subscribed and sworn to before me, in my presence, this 10th day of January, 1923,

(SEAL) JNO. JACKSON,
*United States Commissioner.*

I hereby certify that the above is a true and correct copy of the original affidavit on file.

(SEAL) JNO. JACKSON,
*United States Commissioner as Aforesaid.*

Endorsed. Filed February 1, 1923.
W. D. McReynolds, Clerk.
By Pearl E. Zanger, Deputy.

(Title of Court and Cause.)

ORDER TO SHOW CAUSE

*To Elias Marsters, Federal Prohibition Director for Idaho:*

The above named defendants having filed a petition praying for the return of certain property taken in the course of a certain search conducted by virtue of a certain search warrant issued by United States commissioner, which petition is verified and is supported by the affidavit of the defendant Carl Sorenson; and it appearing from said petition and affidavit that good cause exists for inquiring into the said proceedings had under said search warrant and into the alleged illegality of the issuance of said warrant and of the search and seizure thereunder.

NOW, THEREFORE, It is hereby ordered that the said Elias Marsters, Prohibition Director for Idaho, appear in this Court on the 12th day of February, 1923, at 2 o'clock, P. M., and then and there show cause why the said search warrant and the issuance thereof be not by this Court declared ilegal and said search and seizure thereunder be not by this court declared and held unwarranted and without legal justification, and the said property so seized be ordered returned;

It is further ordered that a copy of said petition and of said affidavit be served herewith, and references hereby made to said petition and affidavit for full par ticulars concerning said search warrant, the issuance thereof and the search and seizure made thereunder, and the grounds and reasons upon and for which said petition is offered.

FRANK S. DIETRICH,
*Judge.*

Feb. 1, 1923.

RETURN OF SERVICE OF WRIT

UNITED STATES OF AMERICA,
DISTRICT OF IDAHO, } ss.

I hereby certify and return that I served the annexed ORDER TO SHOW CAUSE on the therein-named Elias Marsters by handing to and leaving a true and correct copy thereof with him personally at Boise, Idaho, in said District, on the 1st day of February, A. D. 1923.

F. M. BRESHEARS,
*U. S. Marshal.*

By R. M. McCUTCHEON,
*Deputy.*

Endorsed. Filed February 1, 1923.
W. D. McReynolds, Clerk.
By Pearl E. Zanger, Deputy.

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(Title of Court and Cause.)

AFFIDAVIT OF
CARL SORENSON

STATE OF IDAHO,
COUNTY OF ADA,—ss.

Carl Sorenson, being first duly sworn, deposes and says that he is the husband of the above named defendant, Edith Sorenson, that they have been man and wife for a long time prior hereto, and that since the first day of December, 1922, affiant has been living with his family, consisting of his said wife and step-son, the son of his said wife, in a suite of rooms in the Vernon Hotel in Boise, Idaho; that said rooms have

during all of said period been used not transiently but continuously and solely as the residence and dwelling place of himself and his said family; that said rooms consist of a kitchen, a dining room, the room of himself and wife used as a bed room and as a living room, and the bed room of his step-son; that said rooms were so occupied on January 10th, 1923, and had been so occupied ever since the date first above set out and have continued to be so occupied ever since; that the said hotel, which is conducted by affiant and his said wife, has a lobby containing a desk for registration and other business purposes, a parlor for guests, and contains a large number of other rooms used for hotel purposes; that the business of said hotel is and at all times herein mentioned has been exclusively restricted to said lobby, parlor and said other rooms; that no part of the said rooms of the said private residence and dwelling of said family are or have been used for hotel purposes or any purpose other than as such residence or private dwelling;

Affiant further states that there was not, on January 10th, 1923, nor at any time since the date first above set out, any room, suite or combination of rooms in said hotel bearing the number 207 or known or designated in any way by such number; that the rooms set apart as as residence as above stated have at all times mentioned herein been under the control of affiant, as the head of said family, and the rooms used for hotel purposes as above stated have at all such times been jointly controlled by affiant and his said wife; that the only part of said hotel personally occupied by Edith Soren-

son at any of said times was the said suite of rooms above described, and that her occupancy and use thereof was as affiant's wife and for residence purposes only.

(Signed) CARL SORENSON.

Subscribed and sworn to before me this 29 day of January, A. D. 1923.

(Notarial Seal.)

E. G. ELLIOTT,
*Notary Public for Idaho.*
Residence: Boise, Idaho.

Endorsed. Filed February 1, 1923.
W. D. McReynolds, Clerk.
By Pearl E. Zanger, Deputy.

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(Title of Court and Cause.)

AFFIDAVIT OF F. J. GETTS

STATE OF IDAHO,
COUNTY OF ADA—SS.

F. J. Getts, being first duly sworn, deposes and says that he is a long time resident of Boise, Idaho, and is by occupation a carpenter; that he knows the defendants above named, and knows the son of said Edith Sorenson; that on several occasions during the month of December, 1922, affiant worked as a carpenter in the Vernon Hotel in Boise, Idaho; that at all such times defendants and the said son were in charge of said hotel and were living there as a family; that they occupied rooms numbered 2, 3, 4, and 19; that room 2 was the living and bed room of defendants, room three the

dining room, room 4 the kitchen, and room 19 the said son's bed room; that said persons occupied said rooms privately, cooked their meals in said kitchen and served them in said dining room, and lived together and in said rooms as a family; that said rooms were not open to the public, nor were they used for hotel purposes or for any other business purpose at any time while affiant was about said hotel; that affiant has been in said hotel since December, and that said rooms were so privately occupied as above set out by said family at said later times while affiant was in said hotel; that said hotel has a lobby, desk and similar appurtenances and a considerable number of rooms other than the private living rooms of defendants, and that at all times when affiant has been there the hotel business has been restricted to said lobby and said other rooms.

F. J. GETTS.

Subscribed and sworn to before me this 30th day of January, 1923.

E. G. ELLIOTT,
*Notary Public for Idaho.*
Residence: Boise, Idaho.

(SEAL)

Endorsed. Filed February 9, 1923.
W. D. McReynolds, Clerk.
By Pearl E. Zanger, Deputy.

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STATE OF IDAHO,
COUNTY OF ADA,—SS.

Charles Lowden, being first duly sworn, deposes and says that he resides in Boise, Idaho, and is by occupation an electrician; that in the latter part of November, 1922, and at several times thereafter during De-

cember of that year, he was in and about the Vernon Hotel in the line of his occupation, doing certain wiring and installing certain electric fittings and appurtenances; that on several occasions he went into the rooms occupied by Carl Sorenson and his wife, who ran the hotel, to ascertain the cause of a certain trouble that had arisen in the operation of an electric coffee percolator or urn; that at different times he saw the said Carl Sorenson and his wife eating their meals in the dining room which they maintained for their own private use; that there was also a kitchen similarly maintained, and another room in connection with the kitchen and dining room which was occupied by them.

At no time did affiant ever see any business of any sort transacted in any part of said rooms; that the hotel itself consisted of a lobby and quite a number of rooms available for rental to guests, and that affiant is able to state from his observation while in and about the hotel that the hotel business was carried on in said lobby and by the use of the rooms kept for rental; that the rooms occupied by the said Carl Sorenson and his wife appeared to be kept entirely distinct and separate from the part of the premises used in the hotel and to be occupied as a private family residence.

CHARLES LOWDEN.

Subscribed and sworn to before me this 6th day of February, 1923.

(SEAL)

E. G. ELLIOTT,
*Notary Public for Idaho,*
Residence: Boise, Idaho.

Endorsed. Filed February 9, 1923.
W. D. McReynolds, Clerk.
By Pearl E. Zanger, Deputy.

(Title of Court and Cause.)

AFFIDAVIT

STATE OF IDAHO,
COUNTY OF ADA,—SS.

W. G. Jenkins, Jr., being first duly sworn deposes and says that he is a resident of Boise, Idaho, and is engaged in the retail furniture business; that during the latter part of November and the early part of December, 1922, he sold and delivered a variety of household furniture to Carl Sorenson, the defendant above named, and delivered and placed the same in a certain group of rooms in the Vernon Hotel in Boise, Idaho, which rooms were numbered 2, 3 and 4; that he fitted linoleum to the floors of some of said rooms, and that in the course of delivery of said furniture and of the fitting of said linoleum, he was in and about said rooms a number of times during the said period and on or about December 26, 1922; that the rooms were fitted up as a kitchen a dining room, and a bedroom and living room respectively, and that after the delivery of said furniture, they were occupied by Carl Sorenson and his wife and stepson, as a family residence; that the hotel had a lobby and that there were a large number of other rooms fitted up in the usual way for the use of guests of said hotel; that affiant never saw any business of any sort transacted in the family residence above referred to, and apparently all of the business of the hotel was conducted by means of the said lobby and the guest rooms above referred to; that the kitchen and dining room were equipped with furniture and fittings sufficient only to supply the needs of a

small family, and that Room 2 was fitted as a bedroom and living room, and at all times when affiant observed the situation, it seemed to be used and occupied as the living-room of the family and the bedroom of the said Carl Sorenson and his wife.

W. G. JENKINS, JR.

Subscribed and sworn to before me this 9th day of February, 1923.

(SEAL)

E. G. ELLIOTT,
*Notary Public for Idaho,*
Residence: Boise, Idaho.

Endorsed. Filed February 9, 1923.
W. D. McReynolds, Clerk.
By Pearl E. Zanger, Deputy.

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(Title of Court and Cause.)

STATE OF IDAHO,
COUNTY OF ADA,—SS.

E. R. Wilson, being first duly sworn, deposes and says that he is acquainted with Carl Sorenson and his family, who have been residing in an apartment in the Vernon Hotel in Boise, Idaho, for some time, that affiant has been in said apartment as a guest at various times commencing on or about December 1, 1922, and extending throughout the month of December and the month of January, 1923, and that he knows it to be a fact that the said Carl Sorenson and his family, consisting of his wife and stepson, lived in an apartment in the Vernon Hotel during all of said times, which

apartment consisted of rooms 2, 3 and 4 in said hotel, and another room the number of which affiant does not recall; and Room 2 was used as a living room and bedroom of said Carl Sorenson and his wife, and Room 3 was their private dining room, and Room 4 their private kitchen. That the said stepson also had a private sleeping room which affiant is unable to identify by number; that affiant knows that the said apartment was used by said family privately and as their family residence, and that no part of the business of the Vernon hotel was conducted therein; that said hotel, during all of said times, consisted of a lobby containing a registration desk and a considerable number of rooms kept for rental to such guests as might apply for the same; that the business of the hotel was conducted in such lobby and in said other rooms so kept for rental purposes; that the private rooms of the said Sorenson family were not open to patrons of the hotel nor were they open to the public in any way.

E. R. WILSON.

Subscribed and sworn to before me this 6th day of February, 1923.

(SEAL)

E. G. ELLIOTT,
*Notary Public for Idaho,*
Residence: Boise, Idaho.

Endorsed. Filed February 9, 1923.
W. D. McReynolds, Clerk.
By Pearl E. Zanger, Deputy.

(Title of Court and Cause.)

DEMURRER.

Comes now Elias Marsters, Federal Prohibition Director for the District of Idaho, and demurs to defendants' petition filed herein, on or about the 1st day of February, 1923, upon the following grounds, to-wit:

1. That said petition does not state facts sufficient to entitle the defendants to the relief sought in said petition or to any relief whatsoever.

2. That the said petition is not supported by any affirmative showing cognizable in this Court, or by any showing whatsoever sufficient to authorize the Court to grant the relief sought or any relief whatsoever.

WHEREFORE, Respondent prays that the said petition of defendants be dismissed; that they be denied the relief prayed for in said petition and that they take nothing thereby.

E. G. DAVIS, United States District Attorney for the District of Idaho, residing at Boise, Idaho, and

JOHN H. McEVERS, Assistant U. S. District Attorney for the District or Idaho, residing at Boise, Idaho,

*Attorneys for the United States of America and Elias Marsters, Respondent in said petition.*

Service of a copy of the foregoing demurrer is hereby acknowledged this 10th day of February, 1923.

J. R. SMEAD,

*Attorney for the Defendants, Carl Sorenson and Edith Sorenson.*

Endorsed. Filed February 10, 1923.

W. D. McReynolds, Clerk.

By Pearl E. Zanger, Deputy.

(Title of Court and Cause.)

## MEMORANDUM DECISION ON APPLICATION FOR RETURN OF PROPERTY

Feb. 21, 1923

E. G. DAVIS, U. S. Attorney, and JOHN H. MCEVERS, Assistant U. S. Attorney, for plaintiff.

J. R. SMEAD, for Defendants.

DIETRICH, DISTRICT JUDGE:

Defendants petition to have returned or destroyed certain liquor seized by officers acting pursuant to a warrant authorizing the search of rooms in the Vernon Rooming House in Boise, Idaho. They were the proprietors and were operating the Vernon Rooms as a "rooming house", but they say the particular room or rooms in which the liquor was found are held and occupied by them as their own private apartments, used solely and permanently as their residence, and hence constitute their "private dwelling", in the sense in which that phrase is used in the National Prohibition Act. If the rooms constituted a private dwelling they could not be lawfully searched except upon a showing that they were being used "for the unlawful sale of intoxicating liquor". National Prohibition Act, Sec. 25. The search warrant was issued without a showing of sale, but only of possession. Upon the other hand, the affidavit upon which the warrant was issued does not disclose the fact, if it be a fact, that the rooms were a "private dwelling", nor am I satisfied with the showing upon this point upon which the petition is now submitted. In general terms the verified petition of the defendants makes out a case of

"private dwelling", but some of the circumstances are suggestive of a different view.

Referring to the general questions of law discussed, I think it possible for a proprietor of a rooming house to occupy rooms embraced in the rooming house in such manner that they may be deemed to be his "private dwelling", but upon the other hand the mere occupancy of such rooms for residence purposes would not in itself warrant the keeping of liquor therein, even for the occupant's own use. Such occupancy must have no relation, direct or indirect, to the rooming house enterprise; and, it may be added, to be connected with or constitute a part of such an enterprise, it is not indispensable that a room be designated as an office, or furnished appropriately for that purpose, or even that business be directly transacted therein. If, for example, one of the rooms be furnished as a bed chamber and used as such by the proprietor, and he or she remains in it part of the time, for the purpose of being accessible to patrons, and in response to a bell or other call, comes into the corridor, to assign rooms or to collect rental charges, or to render any other service in connection with the enterprise, the room so occupied may be treated as a part of the rooming house business, and not held exclusively for residence purposes.

Manifestly cases may frequently be presented where a just application of the law may turn upon the minute circumstances, for, upon the one hand, the Courts must carefully protect the home from unwarranted intrusion, and, upon the other, there must be equal concern to see that the provisions of the law authorizing searches

for contraband liquor are not practically nullified through cunningly devised schemes by which bootlegging commissaries are given the similitude of "private dwellings".

Because of the inconclusiveness of the record here, I shall therefore deny the petition, without prejudice to a further disclosure at the trial and before the evidence obtained in the search is received, of the circumstantial facts bearing upon the relation of the room or rooms in question to the rooming house enterprise.

Endorsed. Filed Feb. 21, 1923.

W. D. McReynolds, Clerk.

By Pearl E. Zanger, Deputy.

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(Title of Court and Cause.)

Minute Entry. March 3, 1923.

VERDICT

"We, the jury in the above entitled cause, find the defendant, H. Goodfriend, Guilty on the first count, guilty on the second count, guilty on the third count, guilty on the fourth count, guilty on the fifth count, and guilty on the sixth count as charged in the indictment; and

"We, the jury, find the defendant, James D. Agnew, guilty on the first count, guilty on the second count, guilty on the third count, guilty on the fourth count, guilty on the fifth count, and guilty on the sixth count, as charged in the indictment; and

We find the defendant, Sylvester Kinney, guilty on the first county, guilty on the second count, guilty on the third count, guilty on the fourth count, guilty on

the fifth count, and guilty on the sixth count, as charged on the indictment; and

We find the defendant Henry Griffith not guilty as charged on the first count, not guilty on the second count, not guilty on the third count, not guilty on the fourth count, not guilty on the fifth count, and not guilty on the sixth count, as charged in the indictment; and

We find the defendant Carl H. Sorenson guilty on the first count; guilty on the second count, guilty on the third count, guilty on the fourth count, guilty on the fifth count, and guilty on the sixth count, as charged in the indictment; and

We find the defendant Ed Kemp guilty on the first count, guilty on the second count, guilty on the third count, guilty on the fourth count, guilty on the fifth count, and guilty on the sixth count, as charged in the indictment; and

We find the defendant Ed Ward guilty on the first count, guilty on the second count, guilty on the third count, guilty on the fourth count, guilty on the fifth count, and guilty on the sixth count as charged in the indictment.

W. E. BABCOCK, *Foreman.*"

The verdict was recorded in the presence of the jury and then read to them and they each confirmed the same. The defendants were allowed an exception to the verdict.

The defendants were given thirty days in which to prepare and file a Bill of Exceptions and the Court fixed ten o'clock A. M. on April 9th, 1923, as time for

pronouncing judgment, the defendants all being permitted to go upon their bonds to appear at that time.

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(Title of Court and Cause.)

Minute Entry. April 9, 1923.

JUDGMENT

Comes now the defendants with their counsel into Court, this being the time fixed for pronouncing judgment herein. The Court asked the defendants H. Goodfriend, J. D. Agnew, Sylvester Kinney, Carl H. Sorenson, Ed Ward and Ed Kemp if they had any legal cause to show why judgment should not be pronounced against them, the defendants having none, and no sufficient cause appearing to the Court, it was thereupon announced to be the judgment of this Court that the defendant, H. Goodfriend be confined in the United States Penitentiary at McNeil Island, Washington, for a term of fifteen months, and that he pay a fine of $2000.00; that the defendant, J. D. Agnew be confined in the jail of Canyon County, Idaho, for a term of ten months and pay a fine of $1000.00; that the defendants Sylvester Kinney, Carl H. Sorenson, Ed Ward and Ed Kemp each be confined in the jail of Canyon County, Idaho, for a term of six months and that they each pay a fine of $500.00.

A stay of execution of this judgment was granted to ten o'clock A. M. on April 16th, 1923, and supersedeas bond was fixed at $5000.00 for the defendant, H. Goodfriend, $2500.00 for defendant, J. D. Agnew, and $1500.00 each for the other defendants.

(Title of Court and Cause.)

No. 935

ORDER

It is hereby ordered that the time heretofore granted defendants in the above entitled cause for preparing and lodging their bill of exceptions and for procuring a writ of error in the above entitled cause be, and the same is hereby, extended to and including the 16th day of April, 1923.

FRANK S. DIETRICH,
*District Judge.*

Dated March 29, 1923.
Endorsed. Filed March 29, 1923.
W. D. McReynolds, Clerk.
By Pearl E. Zanger, Deputy.

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(Title of Court and Cause.)

No. 935

BILL OF EXCEPTIONS

Be it remembered that on the trial of this cause in the above entitled Court, at the February, 1923, term of said Court, the Honorable F. S. Dietrich presiding, the following proceedings were had, to-wit, a jury having first been impanelled and sworn according to law, the defendants made the following motion to-wit:

MR. HEALY: I wish to make a motion on behalf of all the defendants, that the government be required to at this time elect upon which charge they will ask a conviction of the defendants, whether upon the charge to—of conspiracy to violate the National Prohibition

Act as set out in the first three counts of the indictment, or whether upon the charge of violation of the Internal Revenue Laws as set out in the last three counts of the indictments; the motion being based upon the proposition that the acts are separate and distinct transactions and that the offenses are not of the same character or class of offenses.

I also wish to state that in the event this motion is denied we will probably ask leave of Court to temporarily withdraw the pleas to the indictment and interpose a demurrer and a motion to quash the indictment upon the same grounds as stated in our application for an election.

THE COURT: Motion will be denied without prejudice to its renewal at the close of this case. I assume that counsel for the government contends that all of the charges grow out of the same transactions; they are all connected, and I, of course, shall hold them to that, that is, they must—they will be confined to evidence which relates to the conspiracy charge, and unless that evidence includes other charges, they will be compelled to elect.

MR. HEALY: We would then like to have leave of Court to temporarily withdraw the pleas of not guilty to the indictment, and we move that the indictment be quashed.

THE COURT: The leave is denied.

MR. HEALY: Leave is denied?

THE COURT: Yes.

MR. HEALY: Very well, we will take an exception both to the Court's rulings denying our motion to elect

or requiring the government to elect and also an exception to the refusal of the Court to grant us permission to withdraw the pleas and interpose a demurrer and a motion to quash.

THE COURT: Very well.

Whereupon, the plaintiff offered the following testimony of the following witnesses in support of its case in chief:

MRS. W. H. COPPEDGE called as a witness and being sworn, testified as follows:

My name is Mrs. W. H. Coppedge. I have lived in Whitney district for two years last September and I am a housewife. I saw Dr. Goodfriend about August 1, 1922, on the day of the primary election at Whitney school voting precinct. I had a conversation with him relative to whom he was supporting in the primary for sheriff.

MR. SMEAD: If the Court please unless the government will at this time agree to show that the inception of this conspiracy which they allege and charge dates back to the time they are now talking about, I object to this evidence as entirely too remote and entirely immaterial; so far as we know, it is alleged that this conspiracy was entered into on or about December 1. Now, if this conspiracy is going now to be shown as—an attempt to be shown as commencing sometime last summer, I think we have a right to know it now.

THE COURT: Objection is over-ruled.

MR. SMEAD: Exception.

WITNESS: Would you ask your question again?

MR. McEVERS: Will you read it, Mr. Reporter.

MR. SMEAD: May it be understood, your honor, that all exceptions taken will inure to the benefit of all defendants?

THE COURT: Yes.

MR. MARTIN: All objections as well?

MR. SMEAD: All objections also?

THE COURT: Yes, certainly.

I heard Dr. Goodfriend say concerning Mr. Agnew that he was opposed to his candidacy for sheriff. He said that 28 cases of liquor being brought to Boise were seized and that only 6 of them were turned in and accounted for. He said that later he showed Sheriff Agnew and Mr. Delana some liquor in his office and asked Mr. Agnew if he ever saw that before, and that Mr. Agnew asked where he got it and he told him not to mind where he got it; that a little later he showed him some more; he further stated that before Mr. Agnew was first elected sheriff he was a salesman at $110 a month, that he had been in office one term and had bought the Vernon Hotel, and if he had another term he would buy the Owyhee.

Q. (By MR. McEVERS): Now, did you have any conversation with Mr. Goodfriend concerning Mr. Agnew after the primary?

MR. HAWLEY: Now, if your honor please, I desire to register an objection to this class of evidence.

THE COURT: Just a moment. Read the question until I get the connection.

(Question read.)

MR. HAWLEY: I object to this kind of evidence

as being prejudicial to the defendant Agnew. As stated before, I object to it on the ground that it is incompetent, irrelevant, immaterial and prejudicial. The objection has already been made to the introduction of this evidence on the ground that it would not tend to show a conspiracy as charged here, having commenced in December. We don't know when this other conversation was had. We do know that even talk of this nature not—talk about a defendant of the nature described is liable to be prejudicial and it—unless it comes in as a part of the evidence showing the conspiracy, that it should not be permitted, and then it should be permitted only after the jury is warned in regard to its effect, in other words, here is a conversation between Dr. Goodfriend and this lady, or others—months before, the primary election, and at the time when it was not alleged there was any conspiracy, and in which directly affects the defendant Agnew, was not present, was not engaged in the conversation, and who would be the one that would be undoubtedly prejudiced if there was—by the statements that were made, unless the effect of that was removed in advance.

THE COURT: Gentlemen of the jury, I want to say to you in connection with this testimony that is now offered by the government, as well as that that has already been offered by this witness, it is probably not unlike, in its legal effect, other circumstances which may be brought into the record here, that is, conversations of various ones of the defendants who appear personally, that is, conversations at a time when the

other defendants are not present, and in which the other defendants did not participate. This testimony can be considered by you only as bearing upon the guilt or innocence of the defendant engaged—engaging in the conversation. In this particular instance, the guilt or innocence of the defendant Goodfriend. You, of course, should not be influenced in any way by what is called hearsay testimony against the defendants, and this would be hearsay testimony as against Mr. Agnew. Hence, you will not consider this as evidence against Mr. Agnew. These various circumstances, as I say, are drawn into the record for the purpose ultimately of enabling you to determine whether or not such a conspiracy as is exhibited or disclosed here by the indictment was actually formed, and you have all of the circumstances and all of the conversations by the different persons at different times, then it will be for you to determine whether or not they were acting in collusion or whether or not they were acting in concert, acting by reason of understanding, either expressed or tacit, as I shall ultimately say to you. If you find they were acting pursuant to some common understanding, however it may be reached, then you may find that they were engaged in or had formed a conspiracy. I will instruct you fully on that ultimately, when the case is submitted to you, but I am saying what I do at the present time to guard you against any prejudice against a defendant who was not present and didn't engage in or hear or have anything to do with the particular conversation which is being related by the witness. In this particular instance, Mr. Ag-

new. I again say Mr. Agnew is not to be prejudiced by anything that Dr. Goodfriend may have said out of his presence and out of his hearing. Of course, it may or may not be true so far as Mr. Agnew is concerned, but you will consider the testimony so far as you credit it as against Mr.—or Dr. Goodfriend, and ultimately you may consider all of these conversations and all the circumstances togther to determine whether or not a conspiracy was formed.

The objection will be over-ruled with that explanation.

Just previous to the general election Dr. Goodfriend asked me to support Sheriff Agnew and gave as his reason that Sheriff Agnew had cleaned up his force of deputies and had all churchmen now; and told me if I would work for Mr. Agnew the week before election I could earn $10.

ON CROSS-EXAMINATION the witness further testified as follows:

I did no work for Sheriff Agnew; the first talk of Dr. Goodfriend was at Whitney school house on primary election day; I was working there for a certain candidate and Dr. Goodfriend drove up and came to where we were, myself and two other women that were working there, a Mrs. Dunning and a Mrs, Jackson; Mr. Agnew's opponent was Victor Jackson. I couldn't say positively whether Mrs. Jackson is related to him or not; I am not positive that I heard the first part of Dr. Goodfriend's conversation; I don't know who he was talking to when the conversation started; I couldn't say that I heard everything he said; I don't remember

that he said the fault in the matter of 28 cases of whiskey was due to one man in the sheriff's office; I am not sure that I heard all the conversation; he said Sheriff Agnew had bought the Vernon Hotel; I know Mrs. Ross Jackson from living in the same neighborhood; I don't remember whether I had a speaking acquaintance with her before two years ago last September or not.

Dr. Goodfriend said before the general election that conditions in the sheriff's office had been remedied, that he had cleaned up his force of deputies, and it was on that basis he asked me to support Sheriff Agnew.

MRS. HENRIETTA GOLDSBURY, called as a witness by plaintiff, testifies as follows:

My name is Henrietta Goldsbury. I live at and run the Union Rooming House at 709½ Main Street, have done so since November 1, 1922, and am still operating the place. I know Ed Ward, he has lived at the Union Rooms since about the middle of November.

ON CROSS-EXAMINATION the witness further testified as follows:

Ed Ward has no interest in the Union Rooms, has never had any, and is there simply as a roomer. I have a small place and don't hire help; when I go out I ask anyone who is there to answer the door, and sometimes Mr. Ward or other of the roomers looks after the place while I am out.

HARRY GOODENOUGH, being called as a witness by the plaintiff, testified as follows:

My name is Harry Goodenough. I have lived in Boise since last July and usually work at dairy work.

Q. I will ask you whether or not on or about the 17th of December, 1922, you visited the Union Rooms?

A. Yes, sir.

Q. In Boise. Who was with you?

A. Mr. Gravin.

Q. Did you have any transactions with Henrietta Goldsbury at that time?

A. Yes, sir.

Q. What were they?

MR. SMEAD: Just a moment, your honor. Objected to as not connected with defendants, nothing that any defendant here could be responsible for; Mrs. Goldsbury is not a defendant; certainly there is no competency in this, no materiality.

MR. McEVERS: We will show, if the Court please, before we are through, Henrietta Goldsbury is a co-conspirator, and therefore the acts of one of the co-conspirators made pursuant to a conspiracy is the act of all. She was one of the ones whose name was not known at the time when the grand jury met.

(Mr. Smead made a reply to Mr. McEvers.)

Excepted to as a prejudicial statement.

THE COURT: Gentlemen, you will not consider this testimony unless it is ultimately shown that the witness Goldsbury, the witness who was just on the stand, was acting in collusion with and as one of the conspirators with the other—with the defendants here.

Objection is over-ruled.

MR. SMEAD: Note an exception.

Q. (By MR. McEVERS): Do you know Ed Ward?

A. I believe I do.

Q. What?

A. I believe I do.

Q. Was he there at the time this transaction occurred?

A. Yes.

THE COURT: A little louder.

A. Yes, sir.

Q. (By MR. McEVERS): Just relate what this transaction was?

A. We went up there, bought two drinks, and a pint of moonshine.

Q. White moonshine?

A. Yes, sir.

Q. Did you pay them?

A. Yes, sir.

Q. In the presence of who?

A. Well, I doubt if there was anyone noticed the transaction but myself and the lady.

Q. Was Graven there?

A. He was there, but I don't think he noticed the transaction of the money.

Q (By MR. McEVERS): Did you purchase anything else from her?

A. No, sir.

Q. Did you purchase anything else there that day?

A. No, sir.

Q. Oh, two drinks and a bottle, was that what you said?

A. Yes, sir.

Q. What was in the bottle?

A. Moonshine.

Q. How much did you pay her for the bottle?

A. Two and one-half.

Q. How much for the drinks?

A. One dollar.

Q. What did you do with that bottle after you got it?

MR. HEALY: Objected to as irrelevant, and immaterial.

THE COURT: Over ruled.

A. Took it with me.

Q. (By MR. McEVERS): And did you drink it?

A. Not all of it.

Q. Did you and Mr. Graven drink portions of it?

A. Yes, sir.

Q. Did you become intoxicated?

A. Yes, sir.

Q. State whether or not you were arrested?

A. Yes, sir.

Q. Who arrested you?

A. Mr. Agnew and Mr. Robinson.

Q. What did they do with you?

A. Took us to the county jail.

Q. Did anyone have a conversation with you the next day concerning where you bought the liquor?

A. Yes, sir.

Q. (By MR. McEVERS): Who did that?

A. Mr. Robinson and Mr. Delana.

Q. Was that Andy Robinson?

A. Yes, sir.

Q. Where were you when you had this conversation?

A. In the cell, part of the jail this way, the small locked part there where the separate cells are.

MR. SMEAD: May this all be considered, too, your honor, under the original objection I made, as to his testifying about a conversation he had with Mr. Delana and Andy Robinson and these other matters?

THE COURT: This will all be considered by the jury in the light of the general instructions I have already given.

MR. SMEAD: I would like to have the original objection go to all the testimony, your honor, to save the trouble and delay of repeating.

THE COURT: It will be so understood.

Q. (By MR. McEVERS): What was the nature of this conversation you had with Mr. Delana and Mr. Robinson?

A. Why, simply that if we told where we got it and so on, that the chances are it wouldn't be as hard for us, that was all, no promise given or nothing.

Q. You told where you got the liquor?

A. Yes, sir.

Q. Did you know then who you got it from?

A. Yes, sir.

Q. And you told them who you got it from, did you?

A. Yes, sir.

Q. (By MR. McEVERS): What was done then?

A. We were taken over to Judge Norris' office.

Q. What occurred there?

A. Why, they asked us a few questions.

Q. Was Henrietta Goldsbury brought up there then?

A. Yes, sir, she was before we left.

Q. And you identified her?

A. Yes, sir.

Q. Did you give Mr. Delana any affidavit at that time?

A. Yes, sir.

MR. McEVERS: You may inquire.

MR. McEVERS: Just another question.

Q. (By MR. McEVERS): Up to the time you had given this statement to Mr. Delana and Mr. Robinson had you told Mr. Agnew where you got this stuff?

A. No, sir.

Q. Or Mr. Kinney.

A. No, sir.

MR. McEVERS: You may inquire.

ON CROSS-EXAMINATION the witness testified as follows:

I was a witness at the preliminary hearing of Henrietta Goldsbury in Carl Norris' Justice Court some time ago; I have known Ed Ward since the day we were up at the Union Rooms, the 17th of December; I just saw him in the room; I didn't say at Mrs. Goldsbury's preliminary hearing that I didn't know anyone in the room except Mrs. Goldsbury; I don't think I said I knew any of them except their faces later on; I said two men were there; I did not claim to know them.

Sheriff Agnew and his deputy Robinson arrested me and Mr. Gravin, kept us in jail over night, and we were told the next morning that if we would tell where we got our liquor it might go easier with us; we had liquor in our possession when we were arrested, and

were told the next morning that that was a crime under the state law; since I told this story about Mrs. Goldsbury I have not been prosecuted, and have not been called into Court anywhere except to testify against her; after we were in jail over night Sheriff Agnew and Andy Robinson took us to Carl Norris' Justice Court; Mr. Robinson arrested Mrs. Goldsbury and Mr. Agnew stayed in the Justice Court; he was there when the complaint was sworn to.

GEORGE W. GRAVIN called as a witness by plaintiff testified as follows:

My name is George W. Gravin. I work at the Early Dawn Dairy.

Q. I will ask you whether or not, on or about the 17th of December, 1922, you visited the Union Rooms in Boise?

A. Yes, sir.

Q. Did you see Henrietta Goldsbury there?

A. Yes, sir.

Q. At that time, did you see this gentleman over here, Ed Ward, there at that time.

A. Yes, sir.

Q. I will ask you if you had any transactions with Henrietta Goldsbury?

A. I didn't.

Q. Did anyone in your presence?

A. Yes, sir.

Q. Who was that?

A. Mr. Goodenough.

Q. What was it?

MR. HEALY: Objected to as incompetent, irrelevant and immaterial.

THE COURT: Overruled.

Q. (MR. McEVERS): What was it, what transaction did he have?

MR. HEALY: An exception.

The liquor was supposed to be moonshine; we drank it; it made us a little drunk; we were arrested and taken to jail that evening; next day we told Mr. Delana and Andy Robinson where and from whom we purchased the liquor; we afterwards identified that party; we were taken to Justice Court and a hearing was had; we had not told either Sheriff Agnew or Sylvester Kinney where we purchased the liquor before we made the statements to Delana.

ON CROSS-EXAMINATION the witness further testified as follows:

I testified at the preliminary hearing of Henrietta Goldsbury; I there stated that I didn't know Mr. Delana; I first told my story in the sheriff's office or somewhere about the jail; I didn't at that time tell any body that I had whiskey on the same day long before the time I claimed to have gone to the Union Rooms; they asked me where I got the whiskey the day before, in the sheriff's office; where I got the whiskey I got drunk on;

Q. And you didn't tell them at that time that you had gotten whiskey the day before at a time much earlier than you claimed to have gone to the Union Rooming House, did you?

MR. DAVIS: That is objected to as incompetent,

and immaterial, unless he told something that wasn't true.

MR. SMEAD: If they asked him where he got his whiskey and he suppressed this matter, he certainly didn't make a true statement.

MR. McEVERS: He didn't tell all of the truth, maybe.

MR. SMEAD: That certainly goes to his credibility before the jury.

MR. DAVIS: That wasn't a judicial investigation, anyway.

MR. SMEAD: That don't make any difference. A man that don't tell the truth in an investigation out of Court isn't likely to tell it in Court.

THE COURT: The objection is sustained.

Q. (MR. SMEAD): Isn't it a fact that you did get whiskey on the day you now say you got whiskey at the Union Rooming House, at a time very much earlier than you claim to have gone to the Union Rooming House?

MR. McEVERS: Objected to as immaterial.

Q. (MR. SMEAD): Isn't it a fact.

A. It was supposed to be.

Q. Isn't it a fact that you did?

A. I don't know.

Q. You don't know?

A. I don't know that it was.

Q. You don't know that it was?

A. No.

Q. Isn't it a fact, Mr. Gravin, that you testified at Mrs. Goldsbury's preliminary hearing that you did

get whiskey on the day when you claim you went to her rooming house at a time considerably earlier than the time you claim to have gone up there? Didn't you make that statement at her preliminary hearing?

A. Yes, sir. It was supposed to be whiskey, I don't know.

Q. It was true, wasn't it?

THE COURT: He says it was supposed to be whiskey.

MR. SMEAD: I am asking him if the remarks he made at the preliminary was true, your Honor.

MR. DAVIS: He said he made it.

THE COURT: Do you object to it?

MR. DAVIS: Yes.

THE COURT: Sustained.

MR. SMEAD: Note an exception. That is all.

There were two or three other men present on the occasion when we purchased whiskey from Mrs. Goldsbury, I don't know just how many.

Sheriff Agnew arrested me on the day I bought the whiskey. He might have questioned me at Norris' office as to where I got the whiskey, I don't remember; he may have talked to me in his office at the jail and have endeavored to have me tell him where I got the whiskey I had been drinking and from whom I bought it, I don't remember now, I would not say that he did not.

ELBERT S. DELANA, produced as a witness by the plaintiff, testified as follows:

My name is Elbert S. Delana. I live in Boise, Idaho, and was prosecuting attorney of Ada County in 1922.

Q. I will ask you whether or not you saw Gravin, George W. Gravin, and Harry H. Goodenough, on the 18th of December, 1922.

A. I did.

Q. Where were they when you first saw them, Mr. Delana?

A. At the sheriff's office.

MR. SMEAD: This is objected to, as formerly stated, as incompetent and immaterial, and entirely too remote, and not relating to the subject matter of this prosecution.

THE COURT: Overruled.

MR. SMEAD: And the objection may be considered as continuing, your Honor?

THE COURT: Yes.

MR. SMEAD: And an exception to the ruling?

THE COURT: Yes.

I saw him at the Sheriff's office; Andy Robinson, a deputy sheriff, was with me; Mr. Agnew was not present to my knowledge; I didn't say if Mr. Kinney was not in the office; he might have been and so might Mr. Agnew; they were not present at the conversation; Goodenough and Gravin were arrested for disturbing the peace, and I was called up by Mr. Robinson, as I recall it, and asked to come up and see them; then I suggested that we find out where they got their liquor and we went into the iron barred part of the jail and he brought in Mr. Goodenough first, I think and I had some conversation with him and he finally told me where they got the liquor; then Mr. Gravin was brought in and corroborated the story that Mr. Goodenough

had told us as to where they got the liquor and what they paid for it; we then went to Judge Norris' office and prepared an affidavit under the state law that these two parties had information concerning violations of the liquor laws and asked to have them subpoenaed forthwith; a subpoena was issued and Mr. Robinson brought them down to Norris' office, where they were examined under oath and testified concerning the transaction; then the boys didn't know the parties or party from whom they made the purchase, but gave us the address, and I prepared a complaint against Mrs. Etta Goldsbury who was the proprietress of the rooming house there and had her brought over so that the boys might be able to identify her or not identify her as the case might be. When she was brought over they identified her as the woman who had sold the bottled liquor the day before; she was brought in charged with the sale of intoxicating liquor. I went out of office January 8, 1923; the charge was pending at that time; I was later approached by Mr. Smead after the case had been set for preliminary examination and Mr. Smead saw me or telephoned me and told me she was ill and would not be able to appear at that time and it was continued; I don't have any recollection of Sheriff Agnew being present in Judge Norris' office when these boys were examined; I wouldn't want to say who came in and went out during the time; we were there for some time, but I don't have any recollection of his being there.

ON CROSS-EXAMINATION the witness testified as follows:

The interview was in the jail, Andy Robinson and myself were present, Mr. Goodenough was brought in and Mr. Gravin was brought in one at a time; Mr. Robinson was chief deputy and acted as chief in the absence of the sheriff at that time; I didn't go down to the Justice's office when they did, and I don't believe I know who actually took them down. Andy Robinson appeared with them. I don't know anything about whether Mr. Agnew took them in his car; I don't recollect his being there; I couldn't say who directed Andy Robinson to go and get Mrs. Goldsbury; my recollection is that I requested him to get her right away, she went without any trouble or hesitating.

C. B. STEUNENBURG, a witness for the plaintiff, testified as follows:

My name is C. B. Steunenberg. I am a Federal Prohibition Agent and live in Boise. I have been a prohibition agent about two and a half or three years; I know Edith Sorenson. I don't know Carl Sorenson.

Q. I will ask you whether or not you visited the Vernon Rooms located at 1009½ Main St., on the 10th of January, 1923?

A. I did.

Q. Who was with you?

MR. LANGROISE: Your honor, I anticipate that this is going into a matter, and we would like at this time to object to any evidence as to any property there seized, or anything that occurred there, on the ground that the record as now in this case is undisputed that this was the private apartment or dwelling house of

the defendant Carl Sorenson and Edith Sorenson, and that any property or anything had there was under an unlawful search and seizure.

THE COURT: Well, the objection is premature, I think.

MR. McEVERS: We will connect it up there more before we ask about what they found there?

MR. LANGROISE: You consider it as made?

THE COURT: It is overruled now.

MR. LANGROISE: An exception.

We visited that place, entered the building from a stairway off Main Street, and I saw Edith Sorenson there; there are double doors from the street to the stairway. There is a small desk that stands in the hallway upstairs; there is no office there except the desk; I saw a register there lying on the desk; I heard a buzzer above the door in Room No. 2. That is the room I searched that day; I heard somebody come up the stairs that day and heard the buzzer ring. The sound was simultaneous with parties coming up the steps or going down; the buzzer rang inside the room, I suppose when the door was open;

MR. LANGROISE: We renew our objection, and object further that this is attempting to go into a matter that has already been gone into and closed, and submitted to the Court and immaterial for that reason.

THE COURT: You have a misunderstanding as to its being closed.

MR. LANGROISE: We stand, your honor, on the undisputed allegations of the petition as presented here.

THE COURT: The objection is over-ruled.

John Wagner, Mr. Nickerson and Paul Reynolds were with me when we made the search. Mr. Nickerson went in first and Paul Reynolds followed him;

THE COURT: Just a minute, Mr. District Attorney, let me see. How were these rooms managed, Mr. Steunenberg, as far as you observed, that is, from what place would a person come—you say there was a desk and a registry book upon the desk in the corridor or hallway?

A. Yes, sir.

Q. (By THE COURT): Was there anyone there attending to it?

A. I don't know when they first went in.

Q. Well, if someone came there as a guest or patron how—

A. It would be tended to from the landlady's room. There was no other office or place fixed for a clerk in the hall.

MR. SMEAD: That is objected to as a conclusion of the witness, your honor. He says he don't know.

MR. McEVERS: Let me ask him another question or two, if the Court please.

Q. (By MR. McEVERS): You say you heard this buzzer ring inside of her room when you were in there?

A. I did.

Q. Have you ever been up there before, Mr. Steunenberg?

A. I think over a year before.

Q. Was she there then?

A. No.

Q. Now, you say that Mr. Nickerson went up ahead?

A. Yes, sir.

Q. Before you came in?

A. Yes, sir.

Q. Was—Where was Mrs. Sorenson when you—

MR. LANGROISE: Just a minute, your honor, we would like to have them show their authority for going up there, before they use any of the information gained under that.

THE COURT: Objection overruled.

MR. LANGROISE: An exception.

Q. (By MR. McEVERS): Do you know whether or not the officers had a search warrant that day?

A. Yes, sir.

Q. Now, did you make any search of Room 2?

A. I did.

THE COURT: Just a moment, gentlemen. Gentlemen of the jury, I will excuse you for five minutes. You may retire in charge of the bailiff.

(The jury thereupon retired from the court room, in charge of the bailiff.)

THE COURT: Gentlemen, very briefly, I will hear you on the matter of admissibility of the evidence secured by reason of this search. As I understand it, a record which was made upon a motion or petition for the suppression of some of this evidence in another case, by stipulation, that record is made a part of this record. I will hear the defendants, Sorensons, if they desire to be heard in the way of sworn testimony as to the situation there. I will give them an opportunity to

be heard now, and before passing upon the matter I shall require them to submit to interrogation by myself as to conditions there. In other words, I am not satisfied with the general statements as made in the application and the showing in connection therewith, and desire that they submit to cross examination, or rather, to examination, such testimony, however, not to be heard by the jury or used against them in this trial.

MR. LANGROISE: Your honor, as I understand it, it is a petition here presented, and the only allegation as far as that is concerned is admitted by the government, and it was submitted to the Court, and because of that fact, we wish to stand on the record made so far, and don't care to reopen the matter.

MR. GIBSON: I would make the further objection that it would be improper to follow the Court's suggestion that one of the defendants in this case be required to take the witness stand for examination in these matters or any other—

THE COURT: Well, they have already taken the witness stand by affidavit, Mr. Gibson. If they hadn't made sworn statements I wouldn't ever suggest it, but they have made sworn affidavits which are of a general character. What I desire to know is the truth, what the facts are, and I don't feel that I can get at that without having them testify, or permitting me to ask some questions.

MR. McEVERS: I wish to make this statement for the purpose of the record. We have not admitted the facts as set up in those affidavits. We simply demur

to them and the demurrer simply says that we admit them for the purpose of arguing that demurrer.

MR. SMEAD: If your honor please, although I am not especially appearing for the Sorensons, though I did appear at that time, counsel has seen fit to make that statement, I want to submit again to the Court the precise purpose of that, and it was in my mind when the petition was presented in the original case against the Sorensons. The petition was filed and it does contain very positively and flatly, in very simple and expressive language, certain statements of facts.

THE COURT: Are you speaking for your client here, or for the Sorensons?

MR. SMEAD: I am speaking to answer to what counsel has just said.

THE COURT: Then I can't hear you in respect to the defendants Sorensons at the present time.

MR. SMEAD: I want to state why we took the position that the facts were admitted when that record was made, your honor; we are all interested, of course; of course, there is a certain joinder of interests at this time, your honor. Our clients are charged with a conspiracy here.

THE COURT: But you are not now making the objection, are you?

MR. SMEAD: Well, I will make the objection then, if that is necessary. What I desire to add to what I have already said, is your honor, that when this petition was demurred to and that matter was placed before your honor, we took the position we take now,

that all statements of fact concerned were admitted to be true.

THE COURT: They were admitted, of course, for the purposes of demurrer, but they were not admitted for any other purpose; at least I didn't so understand.

MR. DAVIS: Certainly we are not so stipulating.

MR. SMEAD: The only issue raised was raised by the demurrer.

THE COURT: That was all at that time. The matter was expressly submitted, and it was stipulated that the record made at the preliminary examination should go in.

MR. SMEAD: Yes, that was supporting the petition. There never was any pleading before the Court but the demurrer to the petition, as I understand it.

THE COURT: Call the jury in. I understand, before the jury comes, Mr. Langroise, that you decline to have the Sorensons, or either one of them, submit to interrogation?

MR. LANGROISE: Yes, your honor, we would like to stand on the record as it now stands.

(The jury thereupon returned into Court.)

Q. (By MR. McEVERS): Did you make a search then of any of the rooms of the Vernon Rooming House at that time?

A. What rooms?

Q. Any of them?

A. Yes, sir.

Q. Now—

MR. LANGROISE: We renew our objection to this, your honor.

THE COURT: Overruled.

MR. LANGROISE: And may we have an exception? May it be understood that our objection runs to all this testimony?

THE COURT: Yes.

MR. LANGROISE: And the exception may be so noted?

THE COURT: Yes.

MR. LANGROISE: And I would like to add one other objection, that the proper foundation has not been laid as showing any authority for making any search if any was made?

THE COURT: Overruled.

MR. LANGROISE: An exception.

I searched the kitchen, the dining-room and the bedroom, Room No. 2; Mrs. Sorenson said those rooms were her's;

(Exhibits consisting of one gallon glass jug containing some liquor and an agate iron pitcher were at this point marked and identified by the witness.)

The liquor was in that agate iron pitcher, the jug was in the bottom part of the commode; there was nothing in the jug, Exhibit 1, the liquor was in the pitcher, Exhibit 2; the pitcher was covered with a towel; it was in a wash bowl on a commode or wash stand in Room No. 2 at Sorenson's on the day we made the search.

MR. LANGROISE: It is understood, your honor, I presume, that this is all objected to?

THE COURT: Yes.

MR. LANGROISE: Very well.

(At this point government's Exhibits 3, 4, 5, 6, 7, 8, 9, 10, 11 and 12 were marked for identification and exhibited to the witness.)

Exhibits 3, a pitcher, was on a small tray on the wash stand; I mean the tray marked Exhibit 10; Exhibit 4, a pitcher, was on the tray also; there was a small amount of moonshine whiskey in each pitcher; I poured it into two separate bottles, Exhibits 7 and 8 are the bottles; Exhibits 5 and 6 are glasses that were on the tray on the wash stand; they were all on the dresser; Exhibit 11 lay on the dresser alongside the tray; Exhibit 9 came out of the kitchen, from one of the drawers in the kitchen cabinet, they were corks; we found bottles there at the time, about two cases of bottles, I judge there must have been about 24 in one case and the other about half full; we did not take the bottles with us; we compared the corks to the bottles, and they fit; we sealed up the liquor in the prohibition director's office and put the exhibits in the evidence room; they have been sealed ever since, and have not been tested; they are in the same condition as when we received them.

Q. Mr. Steunenberg, did you have any conversation there with Mrs. Sorenson there at the time of the search concerning their intoxicating liquor or those exhibits?

A. I did.

Q. What was it?

A. After I had gone into the Room 2 and found the liquor and before we had poured it in other containers and sealed it, I stepped out into the hall and

I said to Mrs. Sorenson, "Where is the rest of it?"

MR. LANGROISE: Just a minute, your honor, we would like to make another general exception—objection, to-wit: to testifying to any information gained at the time of this alleged—and have it run to all this.

THE COURT: Overruled.

MR. LANGROISE: An exception, please.

She said, "That is all I have, what you have got in the room, that is all that I have."

Exhibit 12, a napkin, was open and lay across the agate iron pitcher. Edith Sorenson was arrested at that time.

ON CROSS-EXAMINATION the witness further testified as follows:

Mrs. Sorenson said in regard to the search warrant, "Why is this search warrant made to me, and why isn't it made to my husband?" I said, "Well, you have these rooms leased, haven't you?" She said, "I have." I said, "That accounts for it, the search warrant being made out against you or to you." She remarked in my presence that we had better read the search warrant to her husband.

MR. LANGROISE: At this time we interpose a motion to strike all the testimony of Mr. Steunenberg and all the exhibits and demand the return of them for the reasons set out in the petition.

THE COURT: Motion denied.

MR. LANGROISE: Exception.

O. K. NICKERSON, witness for plaintiff, testified as follows:

My name is O. K. Nickerson. I am a Federal Pro-

hibition agent and have been since August 1, 1922. I live in Boise, Idaho. I visited the Vernon Rooms on January 10, 1923. No one accompanied me when I first went in.

MR. LANGROISE: I object, your honor, to any of this on the ground the proper foundation has not been laid for his authority.

THE COURT: Overruled.

MR. LANGROISE: Exception.

I went in alone and Paul Reynolds came in after me; John Waggoner came in and then Pete Steunenberg; Mrs. Sorenson was there when I arrived; I had a search warrant.

(At this point a search warrant and related papers were marked Government's Exhibit 13 and handed to witness.)

That is the warrant I had.

(Exhibit 13 admitted in evidence without objection and read to the jury.)

I served search warrant and left Mrs. Sorenson a copy.

Q. Did you have any conversation with Mrs. Sorenson touching upon intoxicating liquor when you first arrived there?

MR. LANGROISE: At this time, your honor, we wish to interpose again the general objection to any information derived as a result of this search or any property obtained on the ground that this—the search warrant was illegal and the—and so shows by the records in this case and that they entered these apartments, a private dwelling house of the defendants Sorenson's without any search warrant for the search of

that property, and anything obtained under that was illegal.

THE COURT: Overruled.

MR. LANGROISE: Exception.

MR. LANGROISE: And it may run through the—throughout, your honor, to save time, and exceptions?

THE COURT: Yes.

I had no conversation about intoxicating liquor when I first went in; after I read the search warrant to her she asked me to read it louder as she couldn't hear, she had had an operation, I read it louder and immediately said, "Have you any in the house, in the room?" She said, "Yes". She had some whiskey there, she had been sick and operated on, and she had it for her own use.

When I first went in Mrs. Sorenson was stepping out of what I supposed to be her room into the hall; I heard a buzzer ring when I went in there, immediately after opening the door, and then saw her coming out of her room; I had a suit case and asked for a room; she said her rooms were all occupied; there was a chair and a small desk in the corner that was used for registering; the register was laying open on the table; nobody was there when I first went in, nobody was sitting around there; Mrs. Sorenson's room was on the left as you came up the stairs, and the desk was on the right of the stairs, at the head of the stairs; nobody was at the desk when I came up; I did not aid in a search of her room, I saw the other officers do it; I stayed about the head of the stairs with Mrs. Sorenson and her housekeeper during the search; Mr. Reynolds came

three or four minutes after I arrived; I told Mrs. Sorenson the object of my visit after Mr. Reynolds came up; I saw Exhibits 1 to 12 after the search; they were brought out from Mrs. Sorenson's room and taken down stairs and brought into Jackson's office; that was out of Room 2; I went to Jackson's office and Mrs. Sorenson went along.

ON CROSS-EXAMINATION the witness testified as follows:

After I read her the search warrant, I inquired whether there was any liquor there; she told me there was, that she had been sick and had it there for that purpose; the officers were searching at that time; I don't know whether any had been found; they were searching in the other room, and I couldn't see; I couldn't see what they were getting at and she could not see any more than I; we were together; when I went up I wasn't able to go into Mrs. Sorenson's private rooms there; I don't know whether they were locked; the officers entered the kitchen first and went through from the kitchen.

There was a waiting room or lobby at the head of the stairs; I did not see anybody sitting there; I saw nobody at the head of the stairs when I went up; there were two doors at the left of the stairway; there was a door open at the end of the hall; I suppose that was the kitchen; the kitchen opened right off the head of the stairs and the hall ran on from there to the front; I didn't notice any door at the end of the hall; the lobby at the head of the stairs is about 13 or 14 feet wide, the stairway takes up part of this space,

there is just a small space at the head of the stairs, I couldn't tell you how many feet wide or square it is; the desk and hotel register were in this space; the entrance to the Vernon Rooms is down on Main Street; after I was upstairs I could hear a buzzer ring when the door opened, I don't know whether you could hear it downstairs or not; I heard it when the others came in.

RE-DIRECT EXAMINATION:

They searched all the rooms on the left of the stairway; I don't know where Room 7 was or whether they searched it.

RE-CROSS EXAMINATION:

I mean by that all the rooms at the left hand side of the stairway, just the two or three rooms right at the left of the stairway itself, those occupied by Mrs. Sorenson.

PAUL REYNOLDS, a witnes's for plaintiff, testified as follows:

Name, Paul Reynolds; residence, Boise, Idaho; business, prohibition agent for over two years.

I was present at the Vernon Hotel on January 10, 1923, with agent Steunenberg, Waggoner and Nickerson.

Q. Did you make a search of that place at the time?

A. We did.

MR. LANGROISE: At this time we would like to have the same general objection, your honor.

THE COURT: Yes.

MR. LANGROISE: And the same ruling.

THE COURT: It will be so understood.

MR. DAVIS: Can't that be understood as running to the testimony of all the witnesses?

MR. LANGROISE: If that is understood.

THE COURT: Very well.

I noticed a buzzer over the door in Mrs. Sorenson's room, on the inside; I notice the buzzer ring when the door opened downstairs; I made a search of the premises with Steunenberg; we found in Mrs. Sorenson's room a little washstand, found about three quarts of moonshine whiskey, some of it was in an agate iron pitcher and some in two small china pitchers, and a serving tray and two glasses and a small funnel and down in the bottom of the wash-stand was a gallon jug. In the kitchen was a case and a half of pint bottles and in a drawer in the cabinet was some corks; we compared the corks to the bottles; exhibits 1 to 12 are the articles I have just referred to; the towel was across the top of the big pitcher and whiskey was in the pitcher; we put the whiskey in the two small pitchers in two of those bottles and put the corks in the bottles; it was taken to the prohibition director's office; at the commissioner's office Mrs. Sorenson said when the complaint was read to her charging her with having possession of a half gallon of moonshine whiskey that it was supposed to be three quarts; in her bedroom at the Vernon she said that was all the whiskey she had; it was moonshine whiskey we poured in the bottles.

ON CROSS-EXAMINATION the witness testified as follows:

The tray I testified about was an ordinary little tray,

nothing peculiar about it except it had some rings on it where the glasses had been sitting; Agent Nickerson went up to the Vernon just ahead of me; Mrs. Sorenson and an elderly lady who works there were there; the elderlylady said to me that Edith was out in the hall and I would have to see her; she may have said that the room was her private room; I will not state that she did not.

JOHN L. WAGGONER, a witness for plaintiff, testified as follows:

Name, John L. Waggoner; residence, Meridian, Idaho; business, Federal Prohibition Agent for about 20 months.

I took part in a search at the Vernon Hotel on January 10; we found about three quarts of moonshine whiskey in a room there.

Q. Who was there?

A. MR. LANGROISE: The same objection, your Honor.

THE COURT: Yes.

Mrs. Sorenson was there; about two quarts of liquor were in this large pitcher, Exhibit 2, on a stand in a room in the Vernon Hotel; I saw two other pitchers and two glasses and this tray there; Mrs. Sorenson was arrested.

ON CROSS-EXAMINATION the witness testified as follows:

To go into these rooms that we searched, we went thru what I suppose was the kitchen, through a dining room and into a bed room; the door leading from the bedroom into the hall was locked; I tried that door.

MR. McEVERS: I want to offer in evidence at this time, if the Court please, Government's exhibits—

THE COURT: Is that all with this witness?

MR. McEVERS: Yes, that is all. Call Mr. Jackson. Government's exhibits 2, 5, 6, 9, 12, 11, 4, 3 and 10.

MR. LANGROISE: The same general objection, your Honor, as to any of the entire property, in violation of the constitutional rights of these defendants.

THE COURT: Overruled.

MR. LANGROISE: An exception.

JOHN JACKSON, witness for plaintiff, testified as follows:

Name, John Jackson; residence, Boise, Idaho; business, attorney and United States Commissioner.

Mrs. Edith Sorenson, one of the defendants in this case, was brought before me on January 10, 1923; I fixed her bond at $500; that evening someone from the sheriff's office, I thought it was Mr. Kinney's voice, called me and I went down to the jail; Kinney and Mrs. Sorenson were in the sheriff's office when I came in; I was called about 9:30 P. M. and someone said it was the sheriff's office, that Mrs. Sorenson had her bond and asked to take it and let her go. I said I would come up and get it; I walked to my office and got a blank bond, then went to the sheriff's office about a quarter of 10; Mrs. Sorenson was sitting in a chair in the office and Mr. Kinney was standing by the safe and said "Mrs. Sorenson wants to put up her bond and be released," or something to that effect I wrote out a form of bond and either Mr. Kinney or Mrs.

Sorenson laid $500 in currency on the desk at my left. I couldn't say who laid it there; I asked Mrs. Sorenson to sign the bond, which she did. I asked her who the money belonged to, the purpose of that being to return it to the owner after it had served its purpose; she sort of hesitated and then she said "It belongs to me".

I held a preliminary in that case; Mr. Smead appeared as Mrs. Sorenson's attorney; Ed Kemp was brought before me about January 15, I fixed his bond at a $1,000; Mr. Smead handed the money to me, I don't know who furnished the money; he stated at that time that it belonged to a third person; he did not give the name; Kemp was released on bond on January 16, 1923; Mr. Smead appeared as attorney for Kemp.

ON CROSS-EXAMINATION the witness testified as follows:

I don't believe Mr. Smead stated to me to enter him as Kemp's attorney, he merely put up the bond. I took it that he was representing him and so put it down in my records; I told him I would first go to the bank to get the money in before the bank closed and would then go up to the jail and tell them to let Kemp out; Mr. Smead asked me why I did not phone up and I told him I did not do that because sometimes a mistake occurred and I always went in person to tell them; I may have asked Mr. Smead if he wanted to see Kemp when he was let out; I may have told him at that time that if he wanted to see Kemp I would tell him to come to his office; I believe as a matter of fact, I did tell Mr. Kemp at the jail to go to Mr. Smead's office.

When Mr. Smead told me that the money belonged to certain third parties it was in connection with another statement to the effect that no part of it was Kemp's money; he stated that they wanted to arrange it and have it strictly understood for the benefit of the parties who put up the money that in the event a fine was imposed against Kemp the money could not be held for his fine, and I so notified the clerk; I asked Mr. Smead who the money belonged to for that reason, and he said it belonged to some third parties, some friends who put it up, that he did not care to state who they were or they did not care to have their names mentioned; he may have stated that he did not know who some of them were; I didn't press him at all, I didn't care for that matter; he may have said, when I asked him whose money it was, that it belonged to some friends of Kemp and he did not know just who they were; I gave him a written receipt for the money; I have a copy of the receipt; the paper I now produce is that copy except that it hasn't my signature (A paper marked Plaintiff's Exhibit 14 and offered.)

When Mrs. Sorenson put up her bond I might have spken to her twice before she answered me; I know it to be a fact that she is hard of hearing and she may not have heard me; I don't know whether or not she said at that time that she didn't hear very well or didn't understand me very well; she has at different times told me that she didn't understand, didn't hear well.

I went to the sheriff's office and her bond was ar-

ranged and the money delivered; there was nothing at all unusual in this proceeding; it has happened before in similar proceedings; it is quite usual for a sheriff's office to advise me that the bond money is ready; ordinarily they would try to accommodate women a little more than men in those matters; I couldn't say what the practice of the sheriff's office has been about conducting a prisoner around to let them get bond; they may have done it; I don't recall any particular instance but I think that it has been done by both the sheriff's office and other offices; the U. S. Marshal's office at times goes out with a prisoner to help him find his bondsmen.

ON RE-DIRECT EXAMINATION the witness testified as follows:

A preliminary hearing in the Ed Kemp case was waived; I think Mr. Smead appeared as his attorney and waived the preliminary.

ON RE-CROSS EXAMINATION the witness testified as follows:

The Kemp bond was furnished on January 16 and the hearing was waived on January 23; Mr. Smead and Mr. McEvers, the assistant United States Attorney and Mr. Steunenberg, one of the prohibition officers set here in this Court room conducting another matter and after the other matter was concluded Mr. Smead had a conference with Steunenberg and McEvers and told me that the Kemp hearing would be waived under certain conditions.

S. C. WEBB, a witness for plaintiff, testified as follows:

My name is S. C. Webb, residence, Caldwell, Idaho; no business at present time, was deputy sheriff of Canyon County.

On January 23, 1923, I visited the Vernon Hotel in Boise with Mr. Jim Kelly, Buck Sterling, the third man whose name I can't recall. I saw Edith Sorenson and Carl Sorenson at the Vernon Rooms at that time; the party of us secured two rounds of drinks of moonshine liquor which were paid for in my presence at 50c a drink; the first drink was bought from Mrs. Sorenson and the last drink from Mr. Sorenson, the defendant.

ON CROSS-EXAMINATION the witness testified as follows:

I was working for the state under the direction of Dr. Almond; it was my duty to work in connection with venereal diseases; I am not sure about the date when I went to the Vernon. I was walking down the street going to the 13th Street dance and Jim Kelly suggested we have a drink; I had other drinks from other places the same day; I reported this to Chief of Police Griffith and Dr. Almond; Griffith is one of the defendants here; I reported the other drinks also; I understand my money came from Boise City through Dr. Almond's office; Dr. Almond is medical advisor for the state of Idaho; the city and state was conducting a drive on venereal diseases and they asked me to take up this work; my money came directly from the city or from a fund that Dr. Almond had charge of; I received $6 a day; I reported about the Vernon Rooms to the Chief of Police the following day; I also made a

report of receiving intoxicating liquor at the Idan-ha; I think Sterling was not employed by anyone; I was just talking with Kelly and Sterling in Murphy's Cigar Store and the drink was suggested on the road to the dance hall by Mr. Kelly between 9 and 10 o'clock in the evening; I reported to the Chief of Police and Dr. Almond and the chief took me up to see the prohibition director; I did not tell the prohibition director what I had told the Chief or any other person in his office; I asked the Chief of Police for employment about that time and was not employed; I didn't tell anyone except the Chief and Dr. Almond about the purchase of liquor; the chief said he didn't have the funds to employ me.

R. B. McCUTCHEON, witness for plaintiff, testified as follows:

I am deputy United States Marshall. I arrested Carl Sorenson about 8:15 in the morning, January 27, 1923, on a bench warrant issued out of this Court.

Q. I will ask you whether or not you served abatement papers on the Vernon Hotel in an action wherein Carl Sorenson and Edith Sorenson was defendant, on the 30th of January, 1923?

A. Yes, sir.

MR. LANGROISE: Just a minute. I object to that as absolutely immaterial and prejudicial and has no bearing on this case.

THE COURT: Overruled.

MR. LANGROISE: An exception, please.

I served the abatement papers about 8:30 in the morning on January 30 at the Vernon Hotel.

MR. LANGROISE: At this time, your honor, we make a motion to strike the testimony of Mr. McCutcheon as absolutely incompetent and irrelevant and has no bearing on this case.

THE COURT: Denied.

MR. LANGROISE: Exception, please.

W. V. LEONARD, a witness for plaintiff, testified as follows:

I live in Boise and I am the state chemist for the state of Idaho; I am able to test a liquid for its alcoholic content; I have tested the contents of Exhibits 1, 7 and 8; No. 1 has an alcoholic content of 40.36 per cent of alcohol, No. 8 has 39.76 per cent and No. 7 has 39.67 per cent; if moonshine whiskey stands around open it will test differently.

MR. McEVERS: I offer in evidence at this time government's exhibits No. 1, No. 8 and No. 7.

MR. LANGROISE: Our general objection, your honor.

C. B. STEUNENBERG recalled by plaintiff testified as follows:

I visited the J. H. Evans' ranch on January 15, 1923, with Paul Reynolds, O. K. Nickerson and John Waggoner; the ranch is near the Whitney school about 2½ miles south of Boise in Ada County; we had learned there was a still there and went with a search warrant and searched the place; Mr. Kemp was there, the defendant; when I got there he was standing out in the yard just outside the door; one of the officers were with him; I searched the premises and found a complete still set up, 45 gallons of moonshine whiskey, 10 barrels

of corn mash, about 500 gallons, two oil stoves, two copper cookers, and several pieces of extra coil; the still was at the house, the house was unlocked when I went in there; the boys had already been in.

The kegs stacked in the court room we got on the day of the raid at the Evans' ranch; we took them to the prohibition director's office and have had them there ever since; we left them corked up and small samples were taken out of them yesterday by the state chemist; the contents were the same as when we seized them; the 10-gallon jug in the courtroom and its contents were seized at the same time; Mr. Leonard tested it yesterday; the still was in a room on a small stove set up and attached by a piece of pipe to a barrel; I can't set the still up because the large barrel and the barrel in which the coil was were destroyed; (witness exhibits part of still to jury and demonstrates how the still is put together and set up); there was a strainer, a funnel and two barrels in the house, also pitcher, bucket, a towel and a hydrometer for testing alcoholic content of liquor; the pieces of paper are records of the mash, there was one of these charts over each mash barrel showing evidently the date that it had been set and when it would be ready for use; the towel was hanging in the kitchen.

PAUL REYNOLDS recalled by plaintiff testified as follows:

I was at the J. H. Evans ranch on January 15, 1923, when it was searched; after examining the articles exhibited in the court room, I recognize them as those we found out there that day; Mr. Kemp was in the

barn when we arrived; I didn't go out there; when I first saw him he was going toward the barn with a keg under his arm; we got the keg afterwards and it had moonshine whiskey; we went into the house by the back door, we could get into three rooms; in one room was a bed or cot and an alarm clock, and in the other was a four-burner oil stove without the legs, the legs were in the still-room, and a couple of sacks of grain and an old galvanized can and some groceries; I arrested Kemp and searched him and found a key to the still-room; he said he had no key, that he was subletting that room. I took the key to the still-room from him and later got other keys out of his pocket; I found a padlock on the inside cellar door. I got in with one of the keys taken from Mr. Kemp; when we got in the still-room we found the still and layout all but the copper cans; the still was set up, it was not in operation; the kegs over there were in the still-room and in the cellar we found two copper cans and one coil; we found the charts, the hydrometer and the towel hanging in the kitchen.

Q. Handing you these two papers, did you find those there? Let me identify them. *Idaho Farmer* of March 23, 1922, and *Idaho Farmer* of March 16, 1922, did you find those there?

A. Yes.

(Articles referred to by witness marked Exhibits 15 to 18.)

Exhibit 16 and 15 were on a shelf in the kitchen; No. 17 was in the kitchen and No. 18, the towel, was hanging in the kitchen;

MR. HAWLEY: I would like to ask what the object is in offering these?

MR. McEVERS: They have got Dr. Goodfriend's name on it, and the other has got the Vernon Hotel on it.

MR. HAWLEY: Is there any evidence outside of that kind of proof?

MR. McEVERS: That is all. That is the particular object, for what it is worth, as connecting them with the still.

MR. HAWLEY: We object to them offering the exhibits as incompetent, irrelevant and immaterial. If there is any outside markings, if it is proper for them to be put in, that could be shown. I see no reason why these papers—

THE COURT: The newspapers as a whole do not go in unless you want them to go in, but counsel may read the address on them.

MR. HAWLEY: As far as we are concerned, we are not objecting to that, but we do object to the rest of them. But we are only speaking for the one defendant.

MR. McEVERS: I am just offering the names, that is all I care about, the address.

MR. SMEAD: Exhibit 17 is objected to, your Honor, as containing positively nothing that bears on this case. Some figures and small memoranda on them, but they wouldn't connect anybody with this case or with the exhibit.

MR. DAVIS: They will be connected up later.

MR. SMEAD: We object to it at present. It don't do to put these things in haphazard, with the statement

that somebody sometime is going to sometime connect them up. It has no connection with the case at all.

MR. McEVERS: The only object of the exhibits, if the Court please—

THE COURT: The objection is overruled.

MR. SMEAD: Note an exception. These exhibits 15 and 16 are objected to, your honor, as showing on their face, and to be entirely too remote from the times covered by this indictment, unless it is proved to be of any evidential value. The papers are dated March 23, and March 16, 1922, long before any claim is made by the prosecution that there was any conspiracy or any thought of conspiracy. We submit that a mere address on an old newspaper that somebody or other has picked up and taken somewhere should not be permitted in evidence under those circumstances.

MR. McEVERS: There isn't any proof that anybody took them there.

MR. SMEAD: Well, you may have—

THE COURT: The objection is over ruled.

MR. SMEAD: We note an exception.

THE COURT: Yes.

MR. McEVERS: (Reading) Government's Exhibit 18, consisting of a towel. I call attention to the stamp, "Vernon Hotel".

Government's Exhibit 15, I call your attention to the address, "Dr. H. Goodfriend, R. 4, Boise, Idaho, November 28, 24, 11, 1."

THE COURT: The date of that, so that counsel might have the benefit—the date of the newspaper upon which this name appears is what?

MR. McEVERS: March 16, 1922.

Government's Exhibit 16, a copy of *Idaho Farmer* of date March 23, 1922, addressed Dr. H. Goodfriend, R. 4, Boise, Idaho, November 28, 1924.

Government's Exhibit 17, consisting of a note book, reading from it:

"January one, five, total ten.
January third, ten, total ten.
January fourth, five, total five.
January fifth, total five.
January fifth—
January seventh, five, five, total ten.
January ninth, five, total five.
January eleventh, five, total five.
January twelfth, one, total one.
January thirteenth, one, one, total two.
January fourteenth, two, totaling in all forty-five.

MR. SMEAD: I think our objection to the admission of Exhibit 17 was especially overruled and, if so, I would like to have a special exception noted.

We talked with Mr. Kemp concerning the manufacture of liquor; he said we would have to admit he made good liquor; he was arrested and brought to Boise and the exhibits were brought to the office of the prohibition director and were brought over here today.

ON CROSS-EXAMINATION the witness testified as follows:

I went with Griffith, one of the defendants, to Sampson's Music Store to get information about a still; the man didn't have the information; it was the Abbott still he was going to inform about, I don't know that

Abbott is not interested in this still, I don't think this is the still Mr. Griffith informed me about, but I don't know; after I talked with the man at the Music Store, I went out where he told me and looked around but we didn't see anything there; I told my chief what Mr. Griffith had told me; Mr. Griffith never at any time refused to assist me in locating stills.

CROSS-EXAMINATION BY
MR. SMEAD:

Q. Mr. Reynolds, just look at the paper that I hand you for a minute, will you (witness handed paper). That is a certified copy of the search warrant under which you went out to this place at the time you found the still, isn't it?

A. Yes.

Q. And that is the copy that you served there, isn't it?

A. I think so.

Q. Does that warrant correctly state the reasons for your going there, where it relates that you have made affidavits concerning certain things that had been told you?

MR. McEVERS: I object to that as incompetent, and immaterial.

THE COURT: Sustained.

MR. SMEAD: Note an exception.

Q. Did you make an affidavit prior to obtaining this warrant from Commissioner Jackson, you yourself, personally?

A. Sure.

Q. Did you correctly state in the affidavit you made at that time information which led you to make the search out there on the Evans ranch?

A. Surely.

Q. MR. McEVERS: I object to that as incompetent and immaterial.

THE COURT: I think the affidavit would have to be produced if you desire to use it for impeaching purposes.

MR. SMEAD: I am just asking him in a preliminary way if he correctly stated the information.

THE COURT: Unless he remembers what he said, I don't see how he can properly answer.

MR. SMEAD: The reason I state it, your honor, these warrants always state substantially the same as the affidavit does.

THE COURT: The objection is sustained.

MR. SMEAD: Note an exception. That is all for the present.

JOHN L. WAGGONER, recalled by plaintiff, testified as follows:

Myself and other prohibition agents made a raid, or search of the J. H. Evans place about two miles south of Boise on January 15, 1923; I saw Ed Kemp, one of the defendants, there, he was in the barn; there was a freshly dug hole in the manger and a five-gallon keg of whiskey in the manger; I saw Mr. Kemp go into the barn; he didn't have anything with him then; I found the keg in the manger and it was taken to the Federal Prohibition Office. I cannot identify the particular keg which was in the manger; it was a new keg,

one of the kegs here; I saw the still and the rest of the outfit at the J. H. Evans' place, the still was in one of the rooms of the house; we went into the back door and asked Mr. Kemp to open the door that was locked; he said he had no key; Reynolds searched him, got the key and we went in and found all this stuff; I went into the cellar that day; unlocked the door with a key taken from Kemp; I brought Kemp to Boise before the Commissioner and swore out a complaint against him.

ON CROSS-EXAMINATION the witness testified as follows:

The Evans' place is next to Dr. Goodfriend's home place, about a five-acre tract; I don't know how big the Goodfriend place is, I was never on the place; I was never on the Evans' place before that day; I don't know whether some of the prohibition officers watched it before that or not.

(The various articles identified by prohibition officres as having come from the J. H. Evans' place were at this time offered in evidence.)

W. V. LEONARD, recalled as a witness for plaintiff, testified as follows:

I have analyzed the contents of the barrels marked 3, 4, 5 and 7, also the ones having chemist's No. 9580, 9587, 9581 and 9586; the alcoholic content by volume was, respectively, 35.84 per cent, 42.12 per cent, 40.71 per cent, 41.05 per cent, 23.41 per cent and 40.53 per cent.

LONNIE C. BAKER, a witness for plaintiff, testified as follows:

My name is Lonnie C. Baker, residence Boise, Idaho; business retail grocer at the Star Grocery, 115 N. 10th St.

Exhibit No. 20, a page in the book handed me, is a part of the records of the Star Grocery, where I am a salesman also, and covers the business transactions between the store and Dr. Goodfriend in November and December, 1922; the transactions marked 105 and 119, dated December 8 and 13th, is an order given by Dr. Goodfriend by telephone; he called up and said, as near as I can recollect, that there would be a couple of parties down for some sugar, to let them have it and he would see it was paid for. I didn't personally let them have the sugar; the account was entered as a result of the transaction; I collected this account; the item dated December 1 is balance carried over from November. Dr. Goodfriend paid that and stated as to the other items he would have to see the parties who bought the sugar before he could make a settlement, telling me to come back in about a week and he would pay it; I went back I think about a week later and got the money.

(Exhibit 20, referred to by witness, offered and read in evidence without objection and read to the jury by district attorney, as follows:)

December 23, Dr. Goodfriend, November 30, balance $6.08, No. 113, December 1, cheese, 25c. No. 105, December 8, two sacks sugar $18.50; 111-119, December 13, four sacks sugar $37.00. Payment, January 13, by cash, $6.33. January 19, credit by cash, $55.50.

ON CROSS-EXAMINATION the witness testified as follows:

Dr. Goodfriend has been in the habit of trading at the Star Grocery for sometime; he has carried an account there and paid month by month as the bill was presented; the account has been of a general nature, it might be almost anything we carry; there were two different transactions concerning some sugar on December 8 and 13; I would not be able to identify these dates except as the record shows them; we carry on a considerable business in retail groceries, myself and my father, a good many transactions occur every day with a good many different people, we carry a great many different accounts there; in the transaction dated December 8 Dr. Goodfriend called up, by phone, he did not come to the store; my recollection of what he said is no clearer than I stated it a while ago; of course I don't recall any phone conversation, I carry on a good many of those every day, I don't recollect any phone conversation in detail; he may have said, in substance and effect, that there was a man who wanted to get some sugar and some supplies, or something to that effect, and he would stand good for it; I didn't have a very long conversation with him, I didn't ask him to offer any further guarantee than simply to tell me that he would guarantee the payment for the supplies this party wanted; the second transaction, dated December 13, was a phone transaction too; I couldn't say positively whether he called up or somebody from the store called him up, on account of not knowing positively that there was a phone conversation; I

haven't any particular recollection of just what he said over the phone that day; I don't really know I answered the phone the second time; I am confused between the two transactions, and don't have any definite recollection of what was said either time further than the guarantees, which was the most interesting part; I was most interested to know that Dr. Goodfriend guaranteed the account, and felt if he guaranteed it the account was good; I do not remember who got the stuff; I made the delivery; I only know that on the first occasion we were short of sugar and the party who came to the store was sent to the Davidson Grocery Store to receive it and I called the Davidson Grocery Company and told them to charge it to our account.

I charged it to Dr. Goodfriend not because he bought it but because he said he would guarantee the other fellow's account; unless you count that as a sale to him, I did not sell any sugar on these dates to Dr. Goodfriend himself; I din't sell to him on either date or deliver any to him on either date; when the first payment on the account was on January 13, $6.33, which covered the first item of the December account and the November balance; that covered everything that had been sold to Dr. Goodfriend direct; when I presented this bill to him, he protested about these six sacks of sugar on his bill and stated in substance that he had guaranteed some supplies to the fellow, but didn't guarantee to buy a whole sugar factory; he refused to pay the bill and made the remark he would not pay until he had seen the other fellow.

MRS. CLARA N. LYNCH, a witness for plaintiff, testified as follows:

Name, Clara N. Lynch; residence, Boise, Idaho; business, bookkeeper for I. X. L. Coal Company, which sells coal, hay and grain.

Paper marked Exhibit 21 is duplicate slip of a bill for coal and corn sold at our office; I sold it, I didn't know the man it was sold to; I didn't know that it was Mr. Kemp who bought it, I asked who I should send it to and he said the name Kemp; he said to send it next door to Dr. Goodfriend's place, across from the Whitney school.

(Exhibit 21 offered in evidence without objection and read to jury.)

John Cogburn delivered that stuff; the sale slip was signed by Mr. Kemp as being delivered.

ON CROSS-EXAMINATION the witness testified as follows:

The address which I put on the bill of sale was given me merely by way of telling me where the place was to which it was to be delivered; I was told it was next to Dr. Goodfriend's place and across from the Whitney school, so far as I know that is the only way Dr. Goodfriend figured in the transaction, he never told me anything about the transaction.

J. H. EVANS, a witness for plaintiff, testified as follows:

Name, J. H. Evans; residence, Gooding, Idaho; business, president and general manager of the Farmers' Lumber & Supply Company located in Gooding.

I own five acres near the Whitney school, with a

house on it; around December 1, 1922, I received a telephone call from Dr. Goodfriend concerning the leasing of that place; in this conversation I got the impression a Mr. Kemp had a sick wife and they wanted to rent the place; I told him I didn't know Mr. Kemp but that he could move on and if he wasn't all right I would ask him to move off when I came down; I was to get $10 a month for the place; I received my first check sometime in December, it was Dr. Goodfriend's check.

(Letter marked Exhibit 22 identified by witness as letter that accompanied check just referred to. Letter offered and read to jury without objection.)

I came to Boise on January 19, 1923; I was intending to come to buy lumber and saw a piece in the paper in regard to finding a still out on my place; in Boise I heard that a Mr. Reynolds wanted to see me; he is a federal officer with an office in the Yates Building. I was on my way to see him and met Dr. Goodfriend on 10th and Idaho streets; I talked to him down on the street and he assured me he didn't know anything about the matter and was surprised to know that there was a still there so close to his home; he asked me to come up to his office, and I did; he kept saying that he didn't know anything about it and thoroughly convinced me at the time that he didn't; he paid me $10 at that time for the January rent; he said he didn't want his name connected with it and assured me he was innocent of the matter and asked me to go to the authorities, but I was going anyway; he wanted me to go and tell them he had nothing to do with it, he didn't

want his name connected with it; I don't remember that he asked me anything about this letter, I didn't take the matter as serious then as I might have now; he did not ask me anything about the telephone call to Gooding that I remember; I don't remember that he said anything as to what I was to say to the federal prohibition officers, if he did I didn't observe it because I am in the habit of saying what I think is right without instructions from somebody else; something was said in regard to retaining an attorney for Mr. Kemp, it seems at any rate he said they had caught the goods on him; of course I hadn't been out to the ranch yet and reserved my opinion a great deal until I had made a trip out there; I think he said that Mr. Kemp and his wife would be at his office that afternoon and he would like me to meet them.

After I left his office I went and cashed the check he had given me and then went to the federal prohibition office where I saw Mr. Reynolds and had a conversation with him; after that I went to the Boise-Payette Lumber Company's office on the second floor and then went on up to Dr. Goodfriend's office and told him what conversation I had with Mr. Reynolds; I think I said his name hadn't been mentioned; I don't think Mr. Reynolds had mentioned his name, although I did say that I thought the doctor was innocent; about January 22 I was at the doctor's office again; I think I hadn't any particular business there except I expected to go home in a few days and I have always wanted to be friendly to my neighbors because my place is vacant, and I have been in the habit of calling on my neigh-

bors when I come down; on the 22nd I told the doctor Ed Kemp was at my place Sunday picking up his things and acted as though he was afraid of me, and that he didn't need to be afraid of me; I told him I thought Miller had squealed on Kemp, because Miller's horse had been in there at the time; the Doctor said he was surprised when he saw Buick cars going in there.

ON CROSS-EXAMINATION the witness testified as follows:

I was on my place next to Dr. Goodfriend's off and on during the summer season; I had lived in and around Boise for ten years; I had known Dr. Goodfriend about six years; I spent some of my time on my place next to his, we were there when we had a crop together, and when we were changing people that were on my place; I became quite well acquainted with him, visited his house occasionally; my family never lived out there; I took dinner at his house twice; he had procured the use of my place before for a Spanish woman who lived there in a tent for six months, because she had tuberculosis and he wanted her to live in the open and be where he could watch her; I put another tenant, his brother-in-law, in the house at a later date; he lived there about ten months and moved out about September 1; the house had been vacant from September 1 to December 1 when Goodfriend spoke about renting it to Kemp. His brother-in-law was leaving there in March, 1922.

I believe when I talked to Dr. Goodfriend in his office the first time he said something about having had some notoriety through the newspapers over some

other matters, and there was something said about not wanting any more notoriety; I believe he said to me if I could avoid it he would appreciate my not mentioning his name in connection with renting the place to Ed Kemp because of the notoriety he feared; I do not think he told me to go ahead and tell the truth if I had to; he did most of the talking, I don't remember all that he said; I never told him I would not under any circumstances mention his name in connection with renting the place to Kemp; it was my impression that he said he would appreciate it if I did not mention his name if I could avoid it, something to that effect; it was simply that he would like to have his name kept out of it as far as I could go on it; he didn't ask me to promise that I wouldn't mention his name under any circumstances and I gave no such promise.

I am not, to my knowledge, one of the parties indicted in this case; my name is J. H. Evans; I don't know that I was ever made a defendant of this case; nobody in the district attorney's office talked to me and told me that I was indicted as a defendant in this action which is on trial here, along with Dr. Goodfriend and a number of others.

Q. MR. SMEAD: I would like to ask the district attorney, your honor, if it isn't the fact that this is the Evans who was indicted along with these other defendants. It is a strange proceeding, it is mighty strange if he don't know it.

MR. DAVIS: Yes, he is the defendant.

THE COURT: Just a moment, gentlemen. Pro-

ceed. This does not affect the cross examination of the witness.

I met Dr. Goodfriend at 10th & Idaho Street near the Empire Building where his office is located; I am under the impression that when I went to the building on the second occasion that day I went to the Boise-Payette Lumber Company's office in the same building as his. On January 22, I told him Kemp was at my place on Sunday and acted as though he might be afraid of me; nobody need be afraid of me, I am not dangerous, that is what I meant by saying that. He said he would like to have me meet Kemp and his wife. I do not remember that he gave any reason for it, I wouldn't say that he did not say he would like to have me talk with Kemp and satisfy myself that the Doctor had no connection with the matter, and I wouldn't say that he did, I don't remember.

I came here about two weeks ago with an attorney from Gooding to see about my connection with this case; I was told that I was wanted and I came. I didn't learn at that time that I was charged with having something to do with this still; neither the district attorney nor any of his force ever told me that I was made a defendant in this case; they asked me to make a statement, my attorney didn't tell me I was indicted; I brought him here because I didn't know and he told me because he was coming in anyhow and is a member of my company.

ON RE-DIRECT EXAMINATION the witness testified as follows:

The sheriff at Gooding told me to come to Boise, I

don't know whether I was arrested or not, I came up here with the deputy sheriff and had a conversation with Mr. McEvers, the assistant United States attorney, concerning this case; I gave him an affidavit; he told me he wanted me to tell the truth about the case; I think he told me that the marshal was liable to get me, he didn't tell me that he would get me but told me that he was liable to get me; I don't remember just what the conversation was only that I was wanted as a witness, but there were no papers served on me; I gave an affidavit, which I was perfectly willing to do.

ON RE-CROSS EXAMINATION the witness testified as follows:

I don't remember that Dr. Goodfriend told me that Kemp had paid the January rent when he gave me the second check for rent, I don't remember that he told me that Kemp had paid him $10 and that he wished to turn it over to me; I wouldn't say that he didn't. I don't remember that he told me that Kemp had given him $10 and that he didn't know what to do with it since Kemp's arrest but to turn it over to me. I wouldn't say that he didn't or that he did.

S. J. ATKINSON, a witness for plaintiff, testified as follows:

Name, S. J. Atkinson; residence, Boise, Idaho; manager of Mountain States Telephone Company stationed in Boise for about fourteen years.

(It was agreed by respective counsel that the call about which witness J. H. Evans was asked from Dr. Goodfriend to himself was made and need not be further proved.)

MR. McEVERS: All right. I will have marked for identification Government's exhibit No. 23.

A certain paper was marked Plaintiff's Exhibit No. 23.

Q. Have you in your possession or under your custody as manager of the telephone office the records of the various telephone numbers in Boise?

MR. SMEAD: I object that counsel should not display his exhibit in that manner until it is admitted, your honor. Hold the other side to the jury.

MR. McEVERS: Answer the question.

A. Yes, sir.

Q. And I will ask you if you have with you the records showing who has the number 26?

A. Yes, sir.

Q. Who has it?

A. That is the sheriff's office.

Q. The county court house?

A. Court House.

Q. So that this government's exhibit 23, that has it correctly here, has it?

A. Yes, sir.

Q. Who has the number 925?

A. Vernon Hotel, one thousand nine and a half Main St.

MR. SMEAD: Just a moment, your Honor. I don't know what the purpose of this is, but it is certainly improper for counsel to be talking about the contents of this exhibit, to the jury, until it is offered and admitted.

MR. DAVIS: He is not talking about the contents.

MR. SMEAD: Yes, he is speaking of the exhibit having what the witness testified to correctly. This isn't an occasion to have an exhibit in here. The witness can tell who has certain telephone numbers without having an exhibit in here.

THE COURT: The objection is overruled.

MR. SMEAD: Note an exception.

Q. (MR. McEVERS): That is correct, is it?

A. Yes, sir.

Q. No. 77, who has that?

A. Boise City National Bank.

Q. Do you know where it is located?

A. Eighth and Idaho Streets.

Q. And this is correct as shown on this exhibit?

A. Yes.

Q. 777, who has that?

A. Elliott & Healy, and an extra listing for J. R. Smead.

Q. And where is it located?

A. 533 Empire Building.

Q. So then this is correct, 777?

A. Yes, sir.

Q. 3141, who has that?

A. Henrietta Goldsbury, 709½ Main St.

Q. So that this part of it, 709½ Main Street is correct?

A. Yes, we have it listed in Henrietta Goldsbury's name.

Q. Did you have the address 709½ Main St.?

A. Yes.

Q. 535-J, who has that?

A. White House Buffet, 710 Main Street.

Q. So this record, Government's Exhibit 23, shows it correct?

A. Yes, sir.

Q. 682-J, who has that?

A. J. R. Smead, 1212 Fort Street.

Q. Residence phone, is it?

A. Yes, sir.

Q. So that this Government's exhibit 23 shows that correctly?

A. Yes, sir.

MR. McEVERS: I will offer in evidence at this time Government's exhibit 23.

MR. SMEAD: Objected to at this time. There is nothing shown at this time as to its competency or any reason for introducing it. It is already before the jury.

MR McEVERS: I may tell the Court what the object and purpose of it is.

THE COURT: It may go in.

MR. SMEAD: Note an exception.

ON CROSS- EXAMINATION the witness testified as follows:

Up to February 1 there was another listing for 777, for the LaSalle Extension University.

At this point, Exhibit 24, affidavit for search warrant, search warrant and return thereof in the case of United States of America versus Carl Sorenson and Edith Sorenson was marked for identification, admitted without objection and read to the jury, the same being part of the records of the United States District Court

for the District of Idaho, Southern Division, in the said case).

ROBIN REYNOLDS, witness for plaintiff, testified as follows:

Business, owner and manager of the Radio Service Company; residence Boise; have had experience in electric telephones and telegraphic communications; I am familiar with the principle and operation of detectographs and wireless telegraph.

Q. I will refer to these for the purpose of convenence as Government's exhibit 25. Calling your attention to Government's exhibit 25, I will ask you to come and examine it.

THE COURT: He can see it there.

MR. McEVERS: Will you come and examine it?

(Witness examines same.)

Q Do you know what that is?

A. It is the operating mechanism of the detectograph.

Q. I will ask you if you visited the Curtis rooms on the fifth floor of the Empire Building during the month of January, 1923?

A. The first time I visited was on the 3rd of January, Wednesday night.

Q. And when was the other time?

A. Again the next morning, to check up. They had a little trouble.

Q. In the detectograph?

A. Yes. It wasn't in the detectograph proper. It was in the additions I had put on it.

Q. Now, will you connect this instrument together?

A. The complete instrument or--

Q. Set it up complete, so that you can explain its operation to the jury.

A. This cord is simply reeled on here to permit stringing the wire, and for convenience in carrying. This transmitter is placed on the end of the cord. This is the only part of the apparatus.

Q. MR. SMEAD: If the Court please, we object to this. This witness certainly hasn't qualified as yet to discuss this matter and tell the jury how to operate and use it.

MR. McEVERS: He testified that he understands the operation and has been engaged in that business.

MR. CAVANEY: Only since July, however, of 1922.

THE WITNESS: As I understand that question, you asked me just simply in this particular business. I have worked with electricity—

MR. SMEAD: Just a minute.

Q MR. McEVERS: Now just tell the Court and the jury what other experience you have had.

MR. DAVIS: Speak up louder.

A. My first experience with electrical work dated during the time that I was going through high school in Salt Lake and during the first year of high school and subsequently during my entire time in high school I studied electricity as a special course, and applied it in automobiles, in the form of repairing generators, and by that means I made my way during the last year of school, in repairing generators and going to school at the same time, and since that time I have been con-

nected with electricity at all times in that form, either in generators or electrical forms some way.

Q. When did you go through school?

A. I finished school in 1913.

Q. All right.

A. In 1912 I experimented simply as an amateur with radio and had taken up wireless at that time in an experimental way, and until just the last year and a half or so have not devoted a great deal of time in the business. It has been in an amateur way. Since last August or July, I have been in this particular location. Prior to that for a year I handled radio supplies under my own name.

Q. What does your work consist of in this particular business you are now in?

A. Well, our work consists of radio work, that is radio instruments, but it consists chiefly as we have radio in the amplification of sound.

Q. Radio in the amplification of sound. What do you mean by amplification?

A. Strengthening it or taking weak signals as we have in radio and building them up and making them stronger?

Q. And you have had considerable experience along that line?

A. Yes, sir.

Q You are supposed to do that then, are you?

A. Yes, sir.

Q. And you understand the use and operation of one of these detectographs, do you?

A. Yes, sir.

Q. Now, for the purpose of counsel lodging their objection, I will ask you to explain again the use of this detectograph?

MR. SMEAD: We object that he hasn't qualified.

THE COURT: Overruled.

MR. SMEAD: Note an exception. And we object to its going before the jury until this instrument is qualified for admission.

THE COURT: Well, I understand the witness now is simply being asked as to how an instrument of this kind would operate generally. There is no suggestion that this one was used.

MR. SMEAD: Probably not in the record, but the position of the witness and the fact that he stands in front of the jury with parts of that instrument in his hands and is about to speak, would indicate that he is about to explain that to the jury.

THE COURT: Yes, he may do so.

MR. SMEAD: Note an exception.

THE COURT: You may turn so that the jury will understand.

A. This part of the instrument is the only part that is used to pick up sound. It is simply a very sensitive transmitter, as we have on the telephones, only more sensitive, and it is so arranged with a hook on it and a wire on it that it can be placed in a room, and the cord on the reel to allow placing this wire to another point, at which point the instrument itself will be set up. In the case are two pairs of receivers. These are similar to the ordinary telephone receiver, with the

exception that they are double and a trifle more sensitive. While this is just a carrying box, the rest of the instrument is wired in and consists simply of a switch and two batteries which furnish the current for the set. This switch is placed here for the purpose of shutting it off when not in use, and it has six compacts; by turning toward the right you can vary or increase the volume, and if it is too strong it can be decreased by turning to the left.

Q. By the volume, you mean the volume—

A. The volume of sound would be reduced in the receiver. There are provisions made on the side to fasten the receivers in.

Q. By the side what do you mean?

A. The side of the carrying case That is a complete detectograph equipment as it leaves the factory, with the exception of the lid which is here which carries an extra reel of wire in there in case you have to run it a great distance. Now, in addition, we have—

Q What do you call this instrument here, a black box?

A. It is known technically, or known to the trade as a two-stage amplifier.

Q. And what do you call this box here?

A Known as a B battery. It is made up of little flash light cells.

Q. What is the use of that?

A. It applies the voltage.

Q. Now, the first time that you visited the Curtis rooms, what date did you say that was?

A. January 3rd. It was at night.

Q. What did you do to this—was there a similar instrument to this there at that time?

A. This instrument was there at that time, only except this part.

Q. Which part?

A. The box, the two dry cells, those two receivers, this one and the—

Q. You don't know where the wire itself went?

A. I saw the wire go out of the door, that is all, that is from appearance.

Q. What did you do to the carrying case or receiving end of the instrument when you went there?

A. No change other than to add to it.

Q. What did you add to it?

A. I added this two-stage amplifier and the necessary batteries, and a modulation transformer, switch and the storage battery to light the tubes in addition to two pair of extremely sensitive receivers.

Q. You put those on at the time, did you?

A. I put these on additional.

Q. Where was that receiving box situated in the Curtis rooms?

A. It was located in a portable trunk.

Q. And that was in the residential part of the Curtis' place, was it?

A. Yes, sir.

Q. Did you test them out, to listen over them, to tell whether or not you could hear?

A. Yes.

Q. Could you hear conversations?

A. There was no conversation at the time. It was

at night, as I remember about eleven or twelve o'clock, someplace along in there.

Q. Did you come up again?

A. I came up again the next morning.

Q. What did you do at that time?

A. In making the connections the wire that goes on here to the battery had become cut by closing the lid of the trunk, thereby discharging the battery, and I replaced the battery the next morning.

Q. Did you listen over it to determine whether or not you could hear at that time?

A. Yes I could hear at that time.

Q. Could you hear voices?

A. I could hear voices.

Q. Could you distinguish the voices so that you could distinguish what was being said?

A. Oh, yes.

Q. So that you left it in good operation at that time?

A. It was left in good operation at that time?

Q. Did you examine it at any other time?

A. I examined it, I think, on two occasions, just simply to see that it was operating.

Q. Two occasions later than that?

A. Yes, sir.

Q. And was it operating properly at that time?

A. Yes.

Q. When, as near as you know, were those occasions on which you examined it again? Do you know?

A. I couldn't tell you definitely.

Q. But during the month of January?

A. Yes, they were during the month of January, in all cases.

Q. MR. McEVERS: You may inquire.

ON CROSS-EXAMINATION the witness testified as follows:

This is the same instrument I saw in the Curtis rooms; the transmitter is sensitive except to extremely weak vibrations; if conversations were carried on in the vicinity of the transmitter in a low tone you could hear it in the form of a mumble but not loud enough so that it would be distinct; you could hear an ordinary voice, but you couldn't hear a whisper; it would depend on the position of the disk to a certain extent; the disk is very sensitive to all vibrations; a sudden jar in the structural portion of the room affects the disk, a street-car causing a jarring in vibrations of the building would slightly affect it; if a piece of furniture on which it was placed or hung were violently disturbed that would affect the disk, if it were shaken around and there was vibrations of the disk that would affect hearing through the instrument; I didn't have anything to do with placing the disk on this instrument, I didn't see it placed, the effect of loud noises or a loud tone of voice would depend on the distance from the disk; if that sort of tone were used in the vicinity of a disk it wouldn't disturb it particularly because there are means of weakening it on the machine; I don't think you would have trouble hearing the conversation if it was not weakened at the time; I say there are means of weakening it because if a tone is extremely loud, in any type of this instrument, they blur together to a

certain extent; it would have to be awful loud before you couldn't distinguish it, they do blur together a little; I don't think it is likely that this would occur more than over a telepone; this disk doesn't transmit conversation carried on in a low tone because the vibrations are not strong enough to affect the receiver; the vibrations exist in the transmitter but they are often too weak to go to the receiver; there are some improvements that could be made on the transmitter but if the tone that is in the receiver is built up it can be made audible just the same.

Q. Haven't you heretofore said, speaking of this particular instrument, that the disc on it, the transmitter, wasn't very sensitive?

A. It is plenty sensitive, the receivers are not sufficiently loud to bring up an exceptionally weak tone.

Q. Haven't you heretofore stated that about this particular instrument that if you had occasion to use this instrument again you would want to send away and get a different form of transmitter?

MR. McEVERS: I object.

THE COURT: You mean he so testified here today?

MR. SMEAD: No, that he so stated heretofore out of Court.

THE COURT: Objection sustained.

I went up to the Curtis rooms the first time with Mr. Redeker, a student of chemistry at the high school; he asked me to go; nobody else spoke to me about it at that time; I was there on three occasions; Mrs. Curtis called me the next morning by telephone and

I don't remember who called me on the next occasion, it was Mr. Curtis or Mrs. Curtis; these occasions were all in the month of January; I couldn't tell the exact dates. The last occasion was about the 20th, along there some place, it might have been a little later than that. I haven't been paid for my work yet, I understand I will be; Mr. Curtis told me the prohibition office would pay me; the two storage amplifiers, the B batteries, two of the receivers and the storage battery belong to me; I understand that the detectograph belongs to the County Attorney of Canyon County, or the sheriff's office.

I went with Mr. Redeker at his request to put an amplifier on this equipment on January 3 about 10:30 at night; Mr, and Mrs. Curtis were there and I believe Mr. Kuchkenbacher; the second time I went Mr. and Mrs. Curtis were there, invariably there were two or three there every time I went; Mr. Kuchkenbacher, the prohibition agent, also was there the third time, Mrs. Curtis, Mr. Curtis, and another lady I had never seen before; I don't know exactly how many trips I made, I think it was just three; the first time Mr. Redeker and I went to the shop and got the equipment and got through up there about 12:30; I think we went up about 11:30. Redeker told me they were going to place a detectograph in Dr. Goodfriend's office; he said they wanted a voice amplifier; I didn't put the detectograph in, it was in there. I saw the wire going through the wall at the top of the door between Mr. Curtis' outer office and inner office, I don't know where it went from there on, I didn't see it go into Dr. Goodfriend's office.

THE COURT: You gentlemen want a night session?

MR. DAVIS: I was going to speak to the Court about the advisability of it. I think the prosecution ought to get through this case if possible by tomorrow night and that would be impossible unless we have a night session. Even if we have a night session today, our case may run something over tomorrow, because the next witness will be lengthy and probably will call forth extended cross examination.

MR. HAWLEY: If your honor please, we will do anything to facilitate the—expedite this case, but we do think it is asking almost too much to have a night session, meet here, and in a case of this kind where necessarily the counsel for the defendants, different defendants, have been compelled, or are compelled to review the evidence that has been given to prepare to meet that evidence and all of that. It is not like an ordinary case where each knew his own side, knew practically what was to be submitted to the jury and all of that, but, naturally, the defendants and each of them will be taken by a good many surprises. We have been meeting at half past nine in the morning. We are perfectly willing to take a longer—shorter time at noon, a longer—make it a longer morning, by meeting early, but you have—a morning session, but to have an evening session on top of it, it will absolutely give no opportunity of our consulting with our clients, of our knowing, of our determining what particular evidence we will need, of ascertaining in regard to these new matters which are continually coming up just what

we—what proof we will have to make or by whom it we will make it. It is not an ordinary case by any means.

THE COURT: I don't want to overtax the strength of counsel, but counsel are aware of my own limtations, and the almost absolute necessity of getting through with the case by a certain time. I think we shall have an evening session tonight and see how we get along and try to avoid it in the future. All I care is to be assured we shall be able to get through within the allotted time. It may be we can give you more leisure, later on, Governor Hawley.

GOVERNOR HAWLEY: We will absolutely attempt to assist your honor in every way.

THE COURT: I appreciate that, but it will be very unfortunate if we are not able to get through within the time I have. We will meet at nine-thirty this evening—I mean seven-thirty this evening, gentlemen, seven-thirty.

At five-forty P. M. a recess was taken.

ROBIN REYNOLDS, recalled, testified further as follows:

I studied in high school theoretical electricity, and specialized of course on direct currents; I had no experience with the subject of detectophones in high school, other than experimental work with telephones; since leaving high school I made one installation of a detectograph previous to this one, at Caldwell, the same instrument; that is the limit of my experience with this type of instrument; otherwise I had experience only in telephone work and microphone work or radio; at Caldwell

I simply tested the instrument and hooked it up with the amplifier; I never operated one more than to hook it up and test it and leave the operation to a clerk; in these cases they weren't used as a test; at Caldwell I had an amplifier, the B battery, etc., installed with the detectophone; I operated the instrument at the Grand Hotel about 4 or 5 hours and again at Caldwell probably an hour and a half; and I probably listened over an hour and a half or two hours at the Curtis rooms, that is the total of my experience in listening over the instrument; this instrument is of the same design as the installation at Caldwell; in an instrument of this kind violent air currents affect the transmitter to some extent; a person blowing into it would affect it; I first experimented with radio in an amateur way in about 1912; I went into the business about a year and a half or two years ago.

ON RE-DIRECT EXAMINATION the witness testified as follows:

Q. Mr. Reynolds, will you just set this instrument up again as it was, as it was in the Curtis' rooms.

A. As it was in the Curtis' rooms?

Q. Yes.

MR. SMEAD: That is objected to, your Honor, on the ground that the witness is not properly qualified and the instrument itself is not properly qualified to be displayed before the jury.

THE COURT: Overruled.

MR. SMEAD: Note an exception.

(The witness worked with the instrument.)

Q. (MR. McEVERS): You have got it set up now as it was—?

A. It is operating just as it was.

Q. MR. McEVERS: Will you cut it off so that it won't be—That is all. Call Mrs. Curtis.

MARIE CURTIS, a witness for plaintiff, testified as follows:

Name, Marie Curtis; residence, 523-525-527 Empire Building, Boise; wife of Guy Cutris, have lived in the Empire Building since July, 1922.

(A sketch of the ground plan of rooms occupied by witness and Dr. Goodfriend's offices adjoining in the Empire Building was marked Exhibit 26 and shown witness. Offered in evidence and admitted without objection to illustrate testimony.)

Dr. Goodfriend's inner office is in the Southeast corner of the building, Mr. Curtis' office adjoins that on the west and my private room where I live adjoins Mr. Curtis' office on the west; Dr. Goodfriend's outer office adjoins his private office on the North; there is a door between Mr. Curtis' office and Dr. Goodfriend's inner office with a lock on our side of the door; Dr. Goodfriend does not keep the door locked on his side, he has gone through Mr. Curtis' office a number of times to get into his private office; at the top of the door between Mr. Curtis' office and his office there is a crack and one on the North side of the door; a crack over the door is almost a half inch for a number of inches, and along the side of the door there is probably 3/8 of an inch or more so that you can see clearly through it; you can see through the crack at the top

of the door and see Dr. Goodfriend's desk if you stand on a chair and look over; his desk is in the North east corner of his inner room, in the Northwest corner there is a sort of closet or lavoratory, whatever you want to call it, closed in by partitions which extend 6 or 7 feet high, don't extend to the ceiling; his operating table is located directly in front of the connecting door referred to; looking over the top of the door you can see his desk and the book cases and all that part of the office, right up near the door you could not see; you could see almost from the center of the office all the eastern part, you could see practically all the office up to 5 or 6 feet from the door; you could not see directly down; at the south side of the door it was sort of a vacuum so that you could hear better from that side, but you coud not see through on that side; through the crack on the North side of the door you could see straight through, but not very far on either side of the crack, but when anyone got in range of the opening you could see them.

Along the first part of December I heard a conversation in Goodfriend's office, they were talking about a still; I wasn't paying any particular attenton but they were talking quite loud, and so when they began talking about a still I became interested in their conversation: I moved to the door and listened, and then I got up on a chair and looked over the door; inside of the room I saw a man in there talking with Dr. Goodfriend; at that time I didn't know him, I later recognized him as Mr. Kemp, one of the defendants; they were talking about setting up a still, the equipment

they would have to get. They mentioned corn, sugar and cooking utensils; Dr. asked Mr. Kemp how much money he would need; Mr. Kemp said, "I can't tell you just exactly how much I will need", and he said, "Some of these things I can have charged, but others I will have to pay cash for". And Mr. Kemp said, "This morning already I have spent practically $60 of my own money." The Doctor said, "Well, can't you give me some idea of just how much you have to have?" Kemp said he didn't know; they talked quite a while about how much money he should have, and finally the doctor gave him $20 and said, "Now, here's $20". He said "It's a good thing you didn't ask me for $22 for $20 is all I have." And he said, "You go down and get the stuff." Before that he asked him how much it would be, and Mr. Kemp said, "I don't know how much it will be," and the Doctor said "Can't you find out?" And Mr. Kemp said, "Well, I don't want to go down and ask the price of things before I go to buy it."

Later in the day Mr. Kemp came back and I recognized him as the same man that was there earlier in the morning. It was about noon or a little after; they talked more about the still, Dr. Goodfriend was rather put out because they didn't get to operating sooner; he said "It seems to me you are taking too much time to get the still in operation," and Mr. Kemp said, "Well I have had to have the water piped in the house and then I had to get a sink, we had to have a sink out there", and he said, "all this takes time". That was practically all between Mr. Kemp and Dr. Goodfriend that day.

The next conversation I remember was Dr. Goodfriend and Jim Agnew; I saw him through the door, I knew him, I had seen him and seen his pictures over town when he was running for election; Mr. Agnew came in and they began talking about the still, and the doctor said to Mr. Agnew, "We are having some trouble getting barrels out to the still". And he said, "Jim, you will have to help us get some barrels", and wanted to know if he could, and Mr. Agnew said, "Well I think I can help to get some for you to take out there", and he said, "How are you going to get them out there?" The Doctor said, "Carl will take them out in his car." He said "He will put them in the back of his car, he takes the back seat of the car out and then he puts the kegs or barrels in there", and Mr. Agnew said, "Well I think it would be better if we take them out sometime during the day, it will look less suspicious if you do". Then they talked about a number of places that needed to be cleaned up here in town, and Dr. Gooddfriend said, "Now Jim, you have got to get busy and clean up some of the places in town." Then he read over a list of places. I got only a few names and I don't remember them; he said "You will have to clean them up" and he said, "Now I want you to go ahead and do this," and he said, "I will tell you which ones to get", and he said, "My practice, the type of people that come up here I can find out from them which ones you are to get," and he said, "Get some of the other officers to help, but you be the boss, so that people will be satisfied that it is you that is doing it," he says, "You have to do that."

On about December 28 Carl Sorenson came up; I did not know him, I later recognized him as Mr. Sorenson, the defendant; he came in and they started talking about the operation of a still; Dr. Goodfriend said, "Have you ever called up Ed to find out whether he wants anything or not?" Mr. Sorenson said, "No, I haven't just recently, I will call up right now," and so he called as I remember, 3141, I believe the number was. He asked if Ed was there, and said, "Do you want any of the stuff, Ed?" I didn't hear the other part of the conversation, but he said, "Well you say you want one sack," he said, "I will deliver it Sunday morning about 10 o'clock".

Mr. Agnew came up again and he and the doctor talked over how much money they had on hand, and the doctor said, as I remember, he had something like $337 on hand; and he said, "By the first of the month we should have over $1500", and Mr. Agnew said, "Well I had a note at the bank, and I had this note renewed for 30 days", and the Doctor said, "Well I think we will be able to take care of that very easily within 30 days". At this time I heard Mr. Agnew say, "Doctor, I have three gallons now and I wonder if you can get rid of it for me", "Well, how shall I get it to you?" and the Doctor said, "Put it in stone jugs", then they talked about putting it in a car, but they talked real low and I didn't get whose car it would be put but the Doctor said he would be able to handle it for him. I saw Agnew in there at the time.

Q. I call your attention to about December 29th,

did you see Mr. Griffith, Henry Griffith, one of the defendants there on that date?

A. I did, and at that time, part of this time Mr. McEvers, I was over at your office and you cautioned me to take notes, and beginning the 29th—

MR. SMEAD: We object to what Mr. McEvers told her.

Q. (MR. McEVERS): I will ask you if you did take notes?

A. I did. I took notes at the time these conversations—

THE COURT: The objection is overruled.

MR. SMEAD: Note an exception.

Q (MR. McEVERS): I will ask you if you did take any notes concerning that conversation?

A I did. Beginning the 29th I took notes.

Q. Have you those notes with you?

A. I have.

Q. Did you write them down at the time you heard the conversation?

A. Beginning with the 29th, I did.

Q. And you have those notes with you?

A. Yes.

Q. Now, referring to your notes for the purpose of refreshing your memory, I will ask you to give us what you heard on December 29th.

A. MR. CAVANEY: Just a minute now. Might I ask the witness a few questions?

THE COURT: Yes.

Q. (MR. CAVANEY): Had you ever seen Griffith before this date?

A. Mr. Griffith?

Q. Yes.

A. No, I had not.

THE COURT: Well, that would be cross examination.

MR. CAVANEY: I just wanted to supplement it.

THE COURT: I thought you were going to ask about the notes. You may ask her about when she made these notes, but to go beyond that would be cross examination, more properly speaking.

MR. CAVANEY: Yes, I will try to keep myself within the bounds.

THE COURT: Very well.

Q. (MR. CAVANEY): Did you know that it was Mr. Griffith that was in there at that time?

THE COURT: You need not answer that. That is cross examination.

Q. (MR. CAVANEY): Well, did you know who was talking when you made these notes?

THE COURT: No, you need not answer.

THE COURT: The only reason I am permitting you to question her, Mr. Cavaney, is to find whether or not she may properly use these notes to refresh her memory.

MR. CAVANEY: If the Court please, I think she might know who was making the statements she is repeating here.

THE COURT: But you can't interfere now with the direct examination for that purpose.

MR. CAVANEY: An exception to the ruling of the Court.

Q. (By MR. CAVANEY): How did you make those notes Mrs. Curtis?

A. Just as soon as—I stood at the door most of the time and just as soon as the party who was in the office left I sat right down and made notes of the conversation I heard.

Q. You didn't make them at the time the conversation was occurring?

A. At the time the conversation was occurring I didn't make them; I made them just as soon as the party left the office.

Q. You made them from memory?

A. Yes.

Q. From what you could remember?

A. Just after I heard the conversation before I talked with anyone else I made my notes.

Q. Did you make notes of the entire conversation that took place?

A. Some of the conversation I didn't put in because it was not—It had no bearing on this case at all, and I didn't put some of the conversation in.

Q. Then you selected the kind of notes you would make yourself?

A. I selected the notes that had to deal with the—with this case, yes. His professional talk, I didn't put in.

A. But you were the judge of the notes you made yourself?

A. Yes, sir.

Q. Was no one there directing you?

A. No, sir, there was nobody there talking to me at all. I made the notes before I talked to anybody.

Q. How long after the conversation did you make these notes?

A. Just as soon as the party left?

Q. How long would that be?

A. Oh, sometimes they stayed there fifteen, twenty minutes, and then left, sometimes they were only there five minutes. Sometimes they were there longer.

Q. On this particular occasion of the 29th how long was it before you made your notes after the conversation?

A. After the conversation?

Q. Yes.

A. Just immediately when they finished the conversation, when the conversation ended.

Q. How long were they talking?

A. Oh, I imagine there on the 29th they were talking—I don't just remember the number of minutes. I don't remember just how many minutes they talked.

Q. In those notes you don't purport them to be accurate notes of the entire conversation?

A. The notes are accurate of the conversation that I took down.

Q. (By MR. CAVANEY): Were, of the entire conversation which took place on that date between the respective parties?

A. Not all the conversation. Only that which bears on the case.

Q. Well, are they true and correct notes of that conversation?

A. Yes, sir.

Q. Just so far as you can remember.

A. Yes, sir.

Q. Are they in shorthand or long hand?

A. They are in long hand.

Q. How long did you take on that occasion to make those notes?

A. Oh, I imagine it took me about fifteen minutes to write them down.

Q. And would you say that they are accurate notes, of the entire conversation.

A. They are accurate notes—

THE COURT: She was asked that once or twice. She said not of the entire conversation.

MR. CAVANEY: Well, we will object, your honor, please, to the notes being all read at this time for the reason and upon the grounds, immaterial, irrelevant, and incompetent, the proper foundation has not been laid for the introduction of these notes, and the parties have not been properly identified, and they would not be binding upon the defendant Griffith in this action.

THE COURT: The notes, of course, are not offered, Mr. Cavaney. There is no offer of the notes.

MR. CAVANEY: Well, she started to read from them, your Honor please.

THE COURT: I didn't understand so. Counsel asked her to refer to them to refresh her recollection and she is to testify simply from refreshing her recollection. We will not permit her to read the notes, of course.

MR. CAVANEY: Well, that is what I—

Q. (By MR. McEVERS): Now, looking at your notes, Mrs. Curtis, for the purpose of refreshing your memory, tell us in substance as near as you can what that conversation was. Of course, we understand you can't read your notes, but you can refresh your memory.

A. Yes.

Q. (By THE COURT): Madam, have you refreshed your memory of what occurred by reading your notes over the last few days?

A. Well, I have looked over them, but I have not studied them.

Q. Can't you now without looking at them give us in substance what occurred on this particular day?

A. I believe that I could not.

Q. Very well. You may glance over them and give us the substance of what occurred.

MR. McEVERS: If the Court please, may she read a part of them and then give us the substance, and then read more, there are some of them quite long, and it will be quite difficult for her to read them all and then relate the conversation?

THE COURT: Yes, as you go from one subject to another you can give us the substance of what was said on that particular subject.

Q. (By MR. McEVERS): Refreshing your memory, will you tell us what was said there at that time.

A. Well, on the 29th of December it was about noon, I heard Dr. Goodfriend call a number I didn't take the number down at the time. And he asked for the Chief, for Chief Griffith, and he evidently didn't get him, because he hung up, and then he called an-

other number, and in his conversation I heard him say, "I would like for you to come down right away", and I of course could not say what was said on the other end of the line, and the Doctor said, "Well, then come down about two o'clock, I want to see you". He asked him if it was the Chief when he called up. And then just about two o'clock I was at the door, because I knew they had that date and the chief came in and Dr. Goodfriend said "Hello, Chief," "won't you have a cigar, come on in, have a cigar, sit down". Then they talked on generalities for a few minutes, and then he said, "Chief, you--your man Hill is hanging around at the Jap's place quite a great deal recently."

MR. SMEAD: Now, if the Court please, I object to going into Jap's places. There is no mention of any Jap's place, or any Jap in this conspiracy.

THE COURT: Oh, but she is giving a conversation that occurred between two of the defendants.

MR. SMEAD: Objected to as prejudicial matter outside the issues of this case; unless it is shown before hand that the Jap's place has something to do with the charge certainly the witness is not to be permitted to relate anything and everything that she pleases.

THE COURT: Objection overruled.

MR. SMEAD: Note an exception.

He said "I seen Hill hanging around down at the corner near the Jap's place" and he said, "Now Chief, I want you to keep him away from there", and he said, "I don't want him hanging around there". The Chief answered and said, "Well I can't guarantee just what my men are going to do", he said, "I give them orders

and tell them where to go and they go only where I send them, that is about all I can promise you, I can't guarantee anything. I will tell you, Doctor, you will have to have the lights out there by 12 o'clock or 1 o'clock, because if you don't it is all right with me, I don't care how late you stay there, but if you don't have the lights out by 12 o'clock the people will see the lights on and they will begin to kick about keeping open after 12 o'clock. Then they went on and talked about some gambling going on there.

MR. SMEAD: If the Court please, I move to strike out all the testimony given by this witness subsequent to the objection as not having any connection, as not having any bearing, on this case whatever, prejudicial to the interests of the defendants mentioned.

THE COURT: Mr. McEvers, do you know whether or not you will connect it up what she is referring to, or she referred to? Does it have any connection with what she has said about the case?

MR. McEVERS: About gambling doesn't have anything to do with the case.

THE COURT: That may be stricken out, and the jury instructed to disregard it.

Chief Griffith asked then, "Do you know if there are any stool pigeons?" Goodfriend said, "I don't know of any, I am in a position to know, and if we find there are any, I will let you know". He said, "Jim is O. K., you don,t need to worry about him."

The chief said that Colonel Marsters had told him they were handling whiskey at the Scotch Woolen Mills and he said "Now don't tell anybody this because if

you do I will get in bad with Colonel Marsters and he will never give me any more information if you tell this". Then they started talking about some man on the police force. Dr. Goodfriend told the chief he would have to get rid of that man, I didn't get the man's name; he told him at the same time that this man whoever he was, was double-crossing them, too, and it was up to the chief to get rid of him. Then they talked some politics from then on, and they said they would have to run Pete for Mayor. Then the Doctor said, "we want you to keep out of politics now, just lay low and be quiet and I will take care of that and you will come out all right in the long run, I will just look after that for you, you just keep out of politics."

When the chief left Dr. called 561 and said "Hello Jap, this is Doc, it is o. k., he just left." That was all that took place on the 29th.

Q. (By MR. McEVERS:) Do you remember whether or not a detectograph was installed up there?

A. Yes, there was one.

Q. When was that installed, Mrs. Curtis?

A. Well, it was installed sometime between the first and the fourth of the month. I think it was along about the third, somewhere near the third as I remember it.

Q. Now, who installed that detectograph?

A. Installed it—in which room do you mean?

Q. Well, was it put into Mr. Goodfriend's office, do you know?

A. Well, that little transmitter, whatever it was, was put into Dr. Goodfriend's office.

Q. Now, is this the machine that was put in there, Mrs. Curtis? (Indicating machine.)

A. Yes, sir, that is the same one.

Q. And is this the thing you say was put into Dr. Goodfriend's office?

A. Yes, that was put into Doctor Goodfriend's office.

Q. Now, calling your attention to the diagram, Mrs. Curtis, where was the receiving part of the machine installed?

A. The part we heard the conversation through, you mean?

Q. Yes, the part you hear through.

A. That was in the private room, right here. (Indicating) and it was in a wardrobe trunk in the bottom drawer and drawer next to the bottom of our wardrobe trunk.

Q. That would be on the north side of this partition of the wall, that is, the west—it would be on the west side?

A. Yes.

Q. (By MR. McEVERS): Of the door between your two offices?

A. Yes, it was there, and, of course, the batteries were put right outside of the trunk, right along there (indicating) at the side of the trunk. The batteries were put there.

Q. That was in your private room?

A. Yes, sir.

Q. Where did the wire there lead from the trunk as it went toward Dr. Goodfriend's room?

A. Well, the wire went—from the trunk it went right up to the door between there—our private room and the office and then over the door about half way and then following the—there is a telephone wire runs through there and we wound the wire of the dictograph right up the telephone wire and then bored a hole through the wall between the office and the private room, and then from—when we took the wire into the office we ran the wire south to the outside wall.

Q. But along here? (Indicating.)

A. Yes, to the outside wall, and then there is a—on the south wall for just—I believe the window was almost up against the wall. And then we ran the wire right up along the window, over the window, along the moulding, until it got right to the door between the Doctor—oh, just a little bit over the door, I should say about, oh, four feet or more from the outside wall.

Q. From the partition between Dr. Goodfriend's inner office and Mr. Curtis' office?

A. Yes, sir, we ran the wires along that partition. And then there was a hole bored through there already with one of those little long pieces of porcelain there that evidently had been wires in Dr. Goodfriend's room into our office at some other time. So we took that piece of porcelain out and then ran the wire through—right through the hole in the wall that was already there, and then when we got into Dr. Goodfriend's office we ran the wire north, right—yes, and in the closet, or right along the moulding, and then when we

got to the corner we took the wire right off the moulding, let's see, what direction that would be—

Q. (By MR. McEVERS): East?

A. Yes, east. We took the wire east and took it clear to this corner

Q. That would be to the north or to the northeast corner of Dr. Goodfriend's inner office?

A. Yes, and then we took it clear to the window. There is a window on the east side and we brought it along the east wall until we got to the window and then along the window casing, there is quite a window casing there, probably that wide (indicating) and then the casing is about that wide, I guess, and then along the side there is a board there in the casing and then there is a wire running along the side of the window, and we wound this dictograph wire around the telephone wire, I think it is, and brought it right down to his desk, right down beside of the window casing to his desk, then around the back of the desk and underneath, and there we fastened the—that little receiver or whatever it is there, the transmitter, to—underneath the desk and fastened it on a little three penny nail, and then we bound the nail with tape so that it would not sound on the nail, so there would be no vibration on the nail, and it suspended right along out from the desk so there was air space from the nail and it was right at the end of the nail and hung there.

Q. (By MR. McEVERS): It was right under Dr. Goodfriend's desk?

A. Yes, underneath his desk. Mr. Curtis and I put the dictograph in.

Q. You and Mr. Curtis put it in?

A. Yes.

Q. Who brought the detectograph up there, do you know?

A. Why, I believe Paul Reynolds. Mr. Curtis told me Paul Reynolds brought it up. I was not there the night he brought it up. He brought the machine into our room, but I know now Mr. Reynolds brought it in.

Q. Go ahead then, Mrs. Curtis, with what date you say you have there next.

A. January 4th.

Q. Now, at that time were you listening on the dictograph, or were you listening through the door?

A. On January 4, in the morning, for a part of the time, I was listening over the dictograph.

Q. Which part, the first, or so we will know whether you—

A. Just for a little while. Then I was called in the office and so I left the dictograph. Just the first part I heard the doctor in listening over the dictograph call over the phone.

MR. SMEAD: Just a moment, your honor, we object to this as not properly qualified. We object to this. We object to this testimony there isn't any qualification, qualification here to show you could hear anything over the dictograph.

THE COURT: Objection overruled.

MR. CAVANEY: Note an exception.

MR. CAVANEY: I want to ask a few questions here in aid of a possible objection.

Q. (By MR. CAVANEY): How did you get into Dr. Goodfriend's room?

A. On that occasion I opened the door between his office—his inside office and our office and walked in. It was not locked on the other side.

Q. He was not there?

A. He was not there.

Q. And you were not invited in?

A. We were not invited in.

Q. Then you went in there on your own accord?

A. I went in there at the instructions of the government officials.

Q. And who instructed you?

A. Colonel Marsters' office instructed us.

Q. And you had not conferred with Dr. Goodfriend about going in there?

A. Absolutely not.

Q. You had no authority from anyone in charge of the building for going in there?

A. No, sir.

Q. And then you just voluntarily went in there upon your own volition?

A. I went at the instruction of the government officials.

Q. But you were not invited in there by anyone that was in the room at the time?

A. There was nobody in Dr. Goodfriend's room.

Q. His room was open. The doors were—

A. The doors were closed, but it was not locked.

Q. (By MR. CAVANEY): Was both of his offices open, the front office and the other office also?

A. The door leading from his inside office to his waiting room was locked.

Q. And how did you get into that room?

A. I did not go in there.

Q. You didn't? You just—

A. I didn't go into his outside waiting room because I could have gone out in the hall and gone out and gone around there, because his outside door was not locked.

MR. SMEAD: Now, at this time, if your honor please, based upon the testmony as given, I want to interpose an objection to further testimony about any information obtained or purporting to be obtained by use of this detectograph or this instrument offered here. It is not competent It was in violation of the constitutional rights of the defendant Goodfriend. I don't want to be prolix, but I want the record to show in full my objection. I will state for that purpose further that the government through its authorized agent, the Prohibition Director, caused a trespass to be undertaken, caused the room of Doctor Goodfriend to be invaded without a search warrant, without any authority whatever for entering, and to attempt now to use any information gained through the medium of that trespass and through the continuing trespass which must have resulted if this installation was allowed to remain in his room against his will would be in violation of the constitutional rights under both the fourth and fifth amendments to the constitution, amount to compelling one to give evidence against himself. It is a trespass of the government and a continuous tres-

pass. And I call your attention, your honor's attention, to the Silverthorn Lumber Company against the United States, the case of Kulet against the United States, and the case of Amos against the United States, supporting my contention in this behalf.

MR. CAVANEY: If your honor please, I would like to further object on the part of the defendant Griffith on the grounds and for the reason that this evidence is incompetent, irrelevant and immaterial, not tending to prove or disprove any of the issues in this case, and is hearsay, and the proper foundation has not been laid for the introduction of such testimony.

MR. McEVERS: If the Court please, as to Mr. Cavaney's objection, he couldn't properly object to the evidence, and as to Mr. Smead, I merely want to say that the fourth and fifth amendments to the constitution guarantees the citizen against unlawful searches and seizures and against making him testify against himself. Now, we didn't search anything, we didn't seize anything and certainly he has no right to be protected against incriminating statements he may have made.

MR. SMEAD: The Supreme Court of the United States has flatly laid down the rule in contravention of what counsel has said. The Supreme Court has laid down the rule that where a stealthy entrance is made or forceful entrance made, or however an entrance may be made by any agent of the United States Government, that what transpires then or what is obtained by trespass cannot be used thereafter under the amendment of the constitution in regard to one's giving evi-

dence against himself, and further under the other amendment in regard to search and seizures, the Supreme Court has said that must be most liberally construed and an unlawful entry will not be tolerated nor information gained through unlawful entry tolerated. I submit that under rules those have been laid down by the Supreme Court in very recent cases. This evidence that is offered here, about to be offered, this evidence is in violation of the constitution.

MR. HAWLEY: Your honor please, in addition to what Mr. Smead has said, I think it is a valid objection to raise the question of public policy in a matter of this kind. I think Mr. Smead's objection is valid—or sufficient, but certainly anything that is against public policy, anything that tends to weaken the feeling that the public would have of morality or anything of that sort, should not be tolerated by the Courts, and here we find these people going into a private office, working their way, whether it was locked or unlocked, whether they got in there by subterfuge or force it matters not, working their way into the private office of another party, there interfering with that office, putting this machine in there, trespassing upon the premises and not only obtaining knowledge through the inauguration of a trespass, but acting in a manner if not criminal, verging upon criminality and certainly against public policy. If this could be tolerated, then an entry into my house could be tolerated, into any of the rooms could be tolerated and under the guise of assisting the government, under the pretense as given by this lady that she was directed by the government

officers so to do, then they could effect an entrance into my private house or into any citizen's house, working a hardship of this kind. I say, if your honor please, that it is against public policy, that it would be absolutely intolerable, that evidence obtained in this way should not be admissable, that this kind of conduct either on the part of officers or others should not be tolerated in Courts.

THE COURT: Objection made by Mr. Cavaney will be overruled. I am somewhat in doubt as to the application of the principle referred to by Mr. Smead. Of course, none of the cases cited by him involve the securing of evidence in this way. It is just a question as to whether or not in principle the cases have any application. I will hear you on the matter. I think I shall sustain the objection for the present until I can determine whether or not the evidence is admissable.

MR. McEVERS: Then—

Q. (By MR. McEVERS): Will you just pass over the part of the conversation that you heard over the dictaphone and state the parts which you heard through the door.

MR. CAVANEY: Just a minute. Might I have an exception as to the ruling of the Court.

THE COURT: Yes.

Q. (By MR. McEVERS): Can you just find the part you heard through the door?

A. Yes.

Q. You can pick it up when you come back. Go ahead.

A. I only had just one little conversation over the dictaphone anyway.

MR. SMEAD: Just a little louder.

Q. (By MR. McEVERS): Just go ahead and tell now what you heard through the door.

On January 4 I heard Dr. Goodfriend say "Come in, Kinney". I heard him tell Kinney, and I saw Kinney at that time, that he was going to fix up another place and then Kinney told him of a place that is on the Meridian Road about a half mile west of the Merrill place and about 40 rods South, and then Kinney said the place was owned by a young attorney in Richards & Haga's office, and Kinney said, "The Day Realty Company has the renting of this place; there are various things in there such as mattresses and springs, a chair and a stove, just what will you have to have to start a new outfit?" Then the doctor told Kinney they would have $270 on hand January 1 and they ought to be able to make 15 gallons every day and that would bring them in $4,500 a month And the doctor said, "I would like to rent another place and have you and Carl fix up the place". Kinney said, "I am going to have Carl go out and see Henry Clee and find out from him where we can rent a place if this other one is not satisfactory. I know Henry is O. K." Kinney said Jim was dissatisfied, he said, "He doesn't realize how much work there is in it." Doctor said, "Now suppose we put out 60 gallon a week for a while, that is not so bad, that would be about $680." When Kinney left I went out in the hall and saw him and identified him.

Mr. Agnew came in that day, I got this through the

door; they began talking about the woman who was arrested at the Union Rooming House. This was on January 4. The Doctor said, "Jim, I know that Andy Robinson called one of the boys out of the other room at the sheriff's office and talked to him alone", and Jim said, "Andy did not do any such thing. He said he was there all the time, that Andy brought the two boys there and the girl set there not over two feet from him and Delana asked the boys if they recognized the woman and they said they did. The Doctor said, "I feel sorry for her because she has been sick, but I am not going to put up any money." Jim said, "We can't put up any money for her." Doctor said, "No indeed, I certainly am not going to put up money for her. What do you think I am to put up money for her. But I do feel sorry for her". Then Doctor said the two boys were going to fly or they would testify that they were drunk and didn't know who they bought the whiskey from. He said to Jim, "Well if they should leave town you can't get their written statement in court", and Jim said he didn't know, he thought maybe he could and said he would find out. He said, "If I have to call a venire I will get favorable jurors for this case". The doctor said to Jim, "I have a $25 check coming to you again from the Union Rooming House". Jim said, "I don't want her to know where this money is coming from, I don't want her to know where this money is going, because if she should and then turn and bawl her head off I would be up against it." Doctor said, "I assure you Jim she doesn't know who is getting this money. I fixed everything up so that

no one knows." Agnew said that the Federal men were watching some place, I didn't get the name of the place. He said, "They have an idea it is there and nothing can change them". Then he asked the Doctor where he thought Stewart was and Doctor said he thought he was in Pocatello. Mr. Agnew said he heard he was in Chicago, that his wife was getting mail from him there; he said he got in touch with officers at Pocatello, that he would like to get Stewart; Goodfriend said, "Jim, you have got to let Andy go, you have simply got to get rid of him." Agnew said, "I don't want to do it, but I am going to tell him to keep his mouth shut".

MR. MARTIN: If the Court please, the witness is simply reading from her manuscript there, reading along right like reading a book and we object to it.

MR. HAWLEY: It is simply a pretense about refreshing her memory.

MR. MARTIN: She is simply reading it like one reading a book.

MR. McEVERS: I think in that connection, if the Court please, it is obvious that any witness couldn't listen to conversations day after day for a period of a month and remember the details of that conversation unless she made notes.

MR. MARTIN: She remembered them all during December without making notes, and seemed to have a wonderful memory.

THE COURT: What was the remark Mr. Martin.

MR. MARTIN: I said she remembered the conversations that occurred in December. She testified

to those without any notes, and it was not until January that she commenced to prepare her notes that she is reading now from her statement according to her own testmony. All the testimony she gave as to matters that occurred during December she gave from her memory and without any notes to refresh her recollection, and she seemed to remember them well. Now, she is giving a statement of things which she says occurred during January, and she is simply reading, that is what we object to.

THE COURT: I don't understand that she is simply reading them.

MR. MARTIN. We can see her, your honor please. She simply reads like reading a book.

THE COURT: I think it is a proper use of memoranda made at the time. It is a very familiar practice to use memoranda of figures and dates and other matters.

MR.MARTIN: But these are not figures and dates, your honor. This is a narrative story that this witness has prepared and written out, and she is sitting here in the witness chair now reading it.

MR. HAWLEY: And not as an assistance for memory, but as a substitute for her recollection.

THE COURT: You may proceed.

MR. McEVERS: Go ahead.

MR. MARTIN: We would like an exception to the ruling of the Court permitting her to read her story.

THE COURT: The Court is not permitting her to read her story. The record will show that.

A. At this time Mr. Agnew told the doctor that he

had his note renewed at the bank and that renewal was due about the 18th or 20th of that month, and the doctor said, "Well, I think we will have enough on hand to take care of it at that time." And Mr. Agnew said, well, I can have it renewed again." Then the doctor told Mr. Agnew that Carl was in and had—yesterday and suggested that they use all the money they had on hand to take care of Mr. Agnew's note, and Mr. Agnew said, "No, I don't want you to do that", he said, "I think it was mighty fine of the bank to renew it for me the last time". "Well," the doctor said, "well, I just wanted to show you what a good sport Carl was," and he said, "Carl has saved us $2,000 already by furnishing the car for us." And doctor said, "Well, I will give you that check for $25", and Mr. Agnew said, "No, let it go now; I will get it some other time." And the doctor said to Mr. Agnew, he "Can't you come up tomorrow about eight o'clock", and Mr. Agnew said, "Well, won't you be here any sooner than that," and the doctor said, "Well, I think I will be here about seven or seven-thirty". And at this time the doctor told him that he would find out about Abbott and let him know then when he came up. The doctor said, "Jack Smead wants a bottle of bonded stuff," and he said, "I have to have some, too." And the Doctor said, "I have to have some too." And he says, "Now, Jim, you will have to get some." Doctor said, "I can point out some fellows who know where some of it is." But, he says, they wouldn't have it themselves. Then Doctor said to Mr. Agnew, "You will have to come oftener," and Mr. Agnew said, "I

was up here yesterday, but," he says, "you weren't in," and he said, "you shouldn't go off and leave this door unlocked when you have any of the stuff in here". And the doctor said, "I haven't any of it here now", and he said, "besides, I always lock my door that goes into the office." Doctor said, "I met Hill on the street the other day," and he said, "Hill told me he knew Jack Spencer was gambling"—

Q. (By MR. McEVERS): Don't put that in, Mrs. Curtis.

THE COURT: That may be stricken out.

Q. (By MR. McEVERS): We only want—we don't want to get anything in that isn't--

A. That is all that happened on January 4.

The next day I heard a conversation, it was January 5, through the door; I don't know whether anybody was with me or not, I have no note of it; a patient came into the doctor's office first and then Mrs. Edith Sorenson came in.

MR. MARTIN: What date is that?

A. This is January 5th. Mrs. Sorenson came in and said, "I am so nervous I don't know what to do." She said to Doctor, "Hill was up again last night and told me that Stoops and Nichols--

MR. MARTIN: If the Court please, we object to that as incompetent, irrelevant and immaterial and not binding upon the defendants here.

THE COURT: The jury will remember the instruction I have given them heretofore, that this conversation, of course, would not be binding upon the defendant

Hill himself, he being absent. You will only consider it as against Mrs. Sorenson and Dr Goodfriend.

A. She said, "Stoops and Nichols were liable to come in on her any time," and she said she told Hill she was paying him to keep them away, and Mrs. Sorenson said, "Sometimes I have to go out with Carl," and she said, "When I do go I leave the big girl in charge," and she said, "Sometimes Carl brings a keg of whiskey and leaves it there," and she says, "I can't afford to have my house gone into". And then the Doctor said, "You don't need to have any fear of Stoops and Nichols coming any more", he says, "they can't get a search warrant without the chief knowing it."

MR. CAVANEY: We will object to that as not binding on Chief Griffith.

THE COURT: Yes. The jury will consider it only as against the certain persons who were present.

A. He said, "I had the chief up here and had a long talk with him, and nothing like that is going to happen." She said, "I have no fear of the sheriff's office at all." And Doctor said, "Well, you don't need to be afraid of Jim."

MR. SMEAD: Now, again, your honor, it is more than obvious that the witness is reading a narrative she has written at sometime.

MR. McEVERS: She is entitled to refresh her memory from notes, and it is obvious that, running over a period of a month or so, it wouldn't be accurate if she didn't.

MR. SMEAD: She shoudn't read what she wrote.

THE COURT: I think I will permit her to proceed. Counsel are familiar with the necessity of producing, for instance, a short hand reporter, he is permitted to read his transcript generally. Strictly speaking he can only refresh his memory from it. We all know that he must practcally read what he wrote at that tme.

MR. HAWLEY: If your honor please, this was taken after the time, not at the time the conversation occurred.

THE COURT: It was taken practically at the time. She said it was taken immediately after the conversation closed, that she jotted down notes of the conversation as she heard it.

MR. HAWLEY: It is evident from the notes being read that it is not a conversation, because no conversation ever occurred in the words just as related, it is a recollection of a conversation, and it is evident from the reading of it, because it is not a conversation and couldn't be construed as one, and no people in the world would have a conversation such as have been stated in regard to these different matters. It is just a pretended recollection of a conversation.

MR. MARTIN: May I call your honor's attention to this view, with reference to stenographic notes that are taken at the time a person speaks them, and if the reporter is accurate he reproduces actually the words.

THE COURT: Yes, if he is accurate.

MR. MARTIN: Yes. And this narrative was written by the witness after the happenings were over, and she wrote out her recollection of it in her own words. In other words, I might say something, and if the

reporter got my words, it would be an exact reproduction, and would produce to the person's mind hearing exactly what I had said. Now, if some person a few minutes after or an hour after, or whatever time it takes to write it down, or even fifteen or twenty minutes after I say it, write down in his own language his recollection of what I have said, even a change of a little word or misunderstanding of what I said by the party, might give an entirely different impression to what my words would have done had they been reproduced exactly.

THE COURT: Yes, we are trying to get at the best possible evidence. I think counsel must recognize that notes of a conversation that occurred fifteen months ago are more reliable than the unaided recollection for two or three months.

MR. HAWLEY: I doubt it, your honor, for my part.

THE COURT: Well, you may doubt it, but I don't, that is as a general principle. I assume you are talking about that. Neither one of us is referring to this particular witness.

MR. HAWLEY: Oh, no, we are referring to the facts.

THE COURT: I assume that as a matter of human experience, memory is a little more reliable on what occurred fifteen minutes before than it is of what it occurred two or three months before.

MR. HAWLEY: Possibly, if your honor please, but what we are trying to get at is the exact language of the conversation and whether it was fifteen minutes

after or fifteen days or whatever it was, it was impossible to get the exact language, but certain phrases, certain sentences may be recollected but a continued conversation cannot be recollected afterwards, I don't care how short a time it is, and get the words, unless it was taken at the time in shorthand.

THE COURT: I assume that the district attorney will not argue that this testimony is absolute accurate, but is putting it forward as the best possible testimony that can be gotten of what occurred here. I don't suppose there is any contention on the part of this witness that she is relating precisely what occurred. She is giving her best recollection. She is confessing at least to give her best recollection of what occurred at that time, her recollection being aided which she took a few moments after the conversation closed. It is humanly impossible, of course, to reproduce precisely what occurred at that time, and my only purpose is to get before the jury the best possible, the most reliable testimony of what did occur, and it is humanly impossible to do any better.

MR. SMEAD: The thing I object to, if the Court please, on the part of my client, is, in reading from a note book, necessarily all this witness can give is her own statement, in her own language, of her own impressions as to what the substance of that conversation was. Now, to say that that is the best evidence of the conversation—

THE COURT: What would be better, Mr. Smead? Perhaps you suggest something.

MR. SMEAD: If she wishes to testify generally

here to the subject of the conversation, I have no objection, but to let her read her own narrative, general impressions of what she heard or thought she heard, but to let her read that as the best evidence, I submit it isn't evidence at all and isn't admissable. If there is anything in those impressions that will suggest to her and bring back her memory of what that conversation was, we have no objection to that. But all she can do is to read what she wrote about her own impressions.

THE COURT: She isn't doing that. She is being permitted to look at this book just as one is often permitted to use a diary, sometimes that is written up at the end of a day, perhaps not until the day after.

MR. MARTIN: It is apparent that that isn't what the witness is doing. I have—

THE COURT: I have observed it. I think I shall not hear any further objection about it. You may have your exception.

MR. MARTIN: An exception.

A. Mrs. Sorenson said to the doctor that she thought Hill came up there and talked to her to scare her into giving him more money, and she said she gave him a dollar a day and she wouldn't give him another cent.

THE COURT: Just glance over the subject matter, and then as far as you can, give in your own language what occurred when your memory is refreshed as to the particular subject.

MR. McEVERS: Just go a little slower.

A. And Mrs. Sorenson she asked Hill what he thought she was paying him for, and she says, "I am

paying him to keep those other men away, and then the Doctor said to her, "You don't need to have any fear of the federal men because they can't get a search warrant unless I know it." At this time Mrs. Sorenson left and there was another man came in, and I don't know who the man was, and he said to the Doctor, he said, the Abbot still was at Mayfield in a tunnel, and the doctor called 26 and asked for Jim, and he said, "Jim, that Abbott still that we were talking about is at Mayfield in a tunnel." And that is all I heard on that day, January 5th.

On January 9 I was at the door when Ed Ward came into the doctor's office.

THE COURT: The question is whether you got it by the door or by the detectograph?

A. I got it through the door.

Q. (By MR. McEVERS): Just go ahead now. Read your notes first.

A. At the time that Ed Ward came in, the Doctor said, "Now, this is what I want to talk to you about, Ed," he says, "I don't want you to buy any stuff from anybody else here, because," he says, "we don't want anyone else operating here in Boise," and he says, "If you buy from them you will help them to stay here." He says, "we don't want them here," and he says, "if you buy from anybody else I won't be able to protect you at all." He says, "It is a mighty hard job right now to keep the federal men off." He says, "Unless I know just what you are doing, I am not going to be able to get you any protection at all." Then he told him at this time, he said, "I want you to operate

my wholesale scheme." He said, "I want you to handle it in large quantities, and I want you to establish a gallon route." He said—Doctor said to Ed Ward, "If anyone wants it in ten gallon lots, that is all right; you sell it to them in any quantity they want it in; but," he said, "we prefer to get the kegs back, because we need the kegs," and he said, "you can charge them for the keg and then get it back." He said, "if you have a quantity on hand, you can deal it out in any quantity at all, either in quarts or any way they want it, you can let them have it." He says, "I want you to fix your place so that you will be able to take care of this and have it at your place in quantities." Mr. Ward said at this time, "the other day on the street I met a girl from Nampa and she asked me where she could get some stuff and he said where she could get some stuff," and he said, "I let her have two quarts at that time," and Mr. Ward said, "If I can establish an outside route, that is what I am going to do." He said, "If I can sell this stuff on the outside there is no use of me sticking around here all the time." And the doctor said, "That is just what you do, you get the business on the outside." He said, "In the next two years and possibly four", he said, "all of us ought to be able to make some money out of this." And he said to Mr. Ward, "I figure that you ought to be able to handle between forty and fifty gallons every week," and told him at that time that Carl—not every week, but every month, handle between forty and fifty gallons every month, and he said "last month Carl sold about nineteen gallons." And the doctor said, "Now

any time you want it, you just call up Carl and he will see that you get it." And Mr. Ward said, "I may need some Thursday, and probably again on Sunday." Then the doctor told him, he said, "Now, Ed, you will have to get some sort of a car, a decent sort of a car, and let me know the license number of your car," and Mr. Ward said, "I haven't anything but a Ford now," and the doctor said, "That isn't big enough; you will have to get a different sort of a car." And then the doctor said to him, he said, "If you watch out now possibly a little later you will be able to sell some of this to Joe Millich." And that was all I got on January 9th.

On January 10, through the door between 6 o'clock and 9:30 I heard conversations in the doctor's office:

A. Just as the doctor came into the office I heard him come into the outside office and the phone rang, and he answered the phone, and then the Doctor immediately called 26, but he didn't get anybody. He called 26 a half dozen times.

Q. Just a minute.

MR. McEVERS: If the Court please, I would like to have this chart before the jury so they can see these numbers.

THE COURT: Well, you can call their attention to what number that is after she gives it, and you can have it before the jury but not before the witness.

MR. McEVERS: Well, before the jury is what I wanted, not before the witness.

THE COURT: Yes, you may put it on the easel.

MR. McEVERS: I didn't care for the witness to see it.

THE COURT: Turn it so that the jury can see it.

MR. McEVERS: All right.

Q. (By MR. McEVERS): Go ahead.

A. Next time when the doctor came in and the phone rang and he answered over the phone, he said, "I want to see Carl," and then he called 26 several times, but he didn't get anybody, and then Carl came in, and the doctor said to Carl, he says, "Now, you call them up and tell them about it," and Carl immediately called 925, and he said over the phone, he said, "don't let Florence have the key to room seven." He said, "Don't let her in there at all." And then he said to the party, he said, "everything is all right, is going to be fine." And then I heard the doctor, somebody came in, and I heard the doctor say, "Hello, Kinney," and I heard a woman's voice, but I don't know who the woman was, because I did not see her. And when Mr. Kinney came in, he said, in talking about the warrants, he said, "I saw the warrant", and he said, "The warrant is no good at all, because," he said, "it calls for room 207", and he says, "there isn't any such room as 202 or 207", and Mr. Kinney says, "They can't get away with such a warrant". He said, "It won't hold." Then I heard somebody, I don't know who the person was, ask, "Well, who issued the warrant." And Mr. Kinney said, "I don't know who issued it." And the Doctor said, "Well, somebody has been double crossing us." Then I heard Mr. Sorenson say, "Yes, I think I know who it was; I think it was Ed." And then the doctor called a number over the telephone and I didn't get—I don't remember the number—I

didn't put it down, and he asked for Jack, when he called over this number, and he said, "Jack, there has been a raid on the Vernon, and they got a little moon", and he said "They had a search warrant for room 202 or 207" and he says "There isn't any such room. Can they make that stick?" And then of course I don't know what was said at the other end of the line, and Doctor said, "Well, then, I will see you in the morning about it." And then this conversation took place out in the outside room, the waiting room, and then the doctor came into his inner office and as he came in Mr. Kinney followed him in his inside office, and they stood very near my door, right where I could see them from the lefthand side of the door through the crack, and the doctor had in his hand a number of bills, and Mr. Kinney said, "Doctor", he said, "I tried to get Jackson to put the bond down to $300" and he said Jackson said $1,000 first, I finally got him to split the difference, and it is $500, and the doctor said, "I think I have got that much", and the doctor stood there and counted audibly up to $523, and then I saw him hand —he said, "Now, here, Kinney, here, Kinney, is $500", and I saw him hand Mr. Kinney that money. He was standing right at my door. And he said when he handed the money, "Even if this does cost me something," he says, "I am going to have the pleasure of fighting it", he says, "I like to fight." And then Mr. Sorenson said, "And so do I". And then Mr. Kinney said, "Some of the Klan are after Griffith", and he says, "They kicked Briggs off because they thought he

was doublecrossing them," and Doctor said, "Well, I guess evidently it was somebody else."

MR. CAVANEY: I would like to have that same admonition to the jury to anything made in the presence of the Defendant Griffith, that it will not be binding.

THE COURT: Yes, that will be understood.

A. And then the doctor warned them, he said, "Keep absolutely everything secret; don't tell your best friend," he says, "You don't need to be afraid of Jim, because Jim is not doublecrossing us." And then the doctor said, "Well, I think we had better fix it." He said, "Carl, you go first, and then Kinney, you go next," and that is the way they went, and that was sometime after nine in the evening that they left the doctor's office. That was all on January 10th.

On January 11 I got conversations through the door.

Q. (By MR. McEVERS): Relate what you heard and saw.

A. On January 11th, I saw Mrs. Sorenson come into Dr. Goodfriend's office; Dr. Goodfriend said, "I had to tackle about a dozen fellows down at the Owyhee last night before I got that $500 for your bond", and Mrs. Sorenson said, "Well, when Kinney brought the $500 in, they asked me if that was my money."

MR. DAVIS: You are talking about Mr. Sorenson or Mrs. Sorenson?

A. Mrs. Sorenson, Edith Sorenson. And she said, "Well, when Kinney brought the $500 they asked me if it was my money." And she said, "I just didn't know what to say, and I looked at Mr. Kinney, and

then I said, 'Yes, it is supposed to be mine'." And the doctor advised her to go to Mr. Smead as her attorney. He says, "You get Jack to fight the case for you." And he says, "Mr. Smead will be more reasonable than anyone else," and he said, "then he is a good friend of mine, and I will get him to knock off some, too." And he says, "You know Jack used to be prosecuting attorney and known how to handle these cases." And the doctor says, "We will fight this thing to a finish." He says, "Those federal men can't go into a room without a sworn affidavit that moonshine is absolutely in that room." And he says, "Then they can't go into any other part of the house except that room." That was all that took place on that day.

On January 13th, through the door, I heard the doctor call 925.

A. And in his conversaton he said, "Hello Edith," and he says, "Is Carl there?" and he says, "If I were you Edith, I wouldn't shut down." He said, "I would just sit there and be careful." And just as soon as he finished the conversation with Edith he called up 3141, and he said, "Hello, is this Ed?" And he says, "Don't shut down. He says, "I wouldn't if I were you;" he says, "You know what I told you, no strangers"—and that is all I got on that day.

Q. What is your next day that you have Mrs. Curtis?

A. January 14th.

Q. And where did you get that?

A. I got it from the door.

Q. All right. What did you get that day?

A. The first that I got that day was the doctor called 925, and said that he wanted to see Carl, and very shortly afterwards Carl came in, Mr. Sorenson came in, and I heard Mr. Sorenson tell the doctor that he had about fifty gallon on hand at the present, but he couldn't sell it. And the doctor said, "Why can't you?" and he said, "Well, everyone is scared to death." He said, "The Union House was locked up last night; they didn't sell anything." He said they were all afraid, and then I heard them talking about an appointment, and Carl made an appointment with the doctor for twelve thirty. They were to go out to look at some place. And then the doctor called 3141, and asked for Ed, and when he got him, he says, "I want you to come down right away; I want to talk to you." And Mr. Sorenson was still in there when he called Ed over the telephone, and I heard Mr. Sorenson say that Edith sold out all she had on hand. He said, "After I left you that night and got home she had everything sold out that night." I don't know what night it was. And he said, "Edith didn't shut down at all after the raid." And Mr. Sorenson said, "Edith wants to come up and talk with you." And then Mr. Sorenson left, and Mr. Ward came in.

Q. (By MR. McEVERS): That is one of the defendants you refer to?

A. Yes. Mr. Ward. And the doctor said, "This is what I want to see you about, Ed." He said, "I don't want you to shut down and ruin business," he said, "You must keep going but be careful." And he referred to Colonel Marsters and said he was a bear, and

Mr. Ward said, "Those are the peope I am afraid of," and he said, "Last Friday," he says, "they watched my place all day," and he said, "I am afraid some fellow will come up and get a bottle, and then when he comes down somebody will hit him over the head when he gets down to the bottom of the stairs," and the doctor says, "You don't need to be afraid of that, because they can't search anybody unless they have a search warrant.' He said, it wouldn't go as evidence at all. And then he said, "Now, I don't want you to let anybody have any of this unless you know absolutely who they are. If any of your friends bring in a stranger, don't you sell them anything if they have a stranger with them," and he says, "The best thing you can do, Ed, is to carry it on your person and serve drinks from your person." He told him to get small bottles and carry it that way. And then he told him that he wanted him to put his cash in a room, and register that room under a fictitious name. He said, "Always keep the room registered, and if you have to change casche three or four times a day, do it, but always keep that room registered wherever you have your casche, keep your room registered under a fictitious name." And he said, "I don't want you to lay down on the job, just keep going. The officers won't get you at all." And then Mrs. Sorenson came in soon after Mr. Ward left. And when Mrs. Sorenson came in she was rather worked up over the fact that somebody had told her that the doctor was going to have her jailed, and the doctor says, "You know Edith that is an absolute lie and you know this fellow has

it in for me and that I am not going to do any such thing," and she said that this man told her that the doctor was the cause of the raid, and the doctor said, "you know that I was not." And then she started talking about the raid again. She said Hill says that I was living in room 18, and she said, "I talked to him about it," and said, "he knew that I wasn't living in room 2," and she said that she told him that she could subpoena him for a witness, and she said, "Hill asked me on what grounds I could get him," and she said, "I could say that he knew I was living in room 18," and she said, "Hill asked me what excuse I would have for having men up there," and she said "I could tell them that an argument was going on in my room and I called you up there to settle the argument." And she said to the doctor, "I have got Hill scared about that." And she says to the doctor, "I only lived in room 2 a short time." The next that I have is on January 15th.

Q. (By MR. McEVERS): Did you get that through the door or over the machine?

A. I got it at the door and Mr. Kuckenbecker was at the door with me. I had—I have it here "Mrs. Curtis and Mr. Kuckenbecker at door."

Q. (By MR. McEVERS): What conversation did you hear that time, January 15th?

A. I heard the doctor call 925 and whoever answered, he said, "Well, where is Carl?" and he wanted to know if everything was all right, and he said, "Well, just go right on." Mr. Agnew came into the doctor's office and the doctor asked Mr. Agnew if he knew who

signed the affidavits for the Vernon raid, and Mr. Agnew said that he did not. And the doctor said, "Well, I want you to find out," and Mr. Agnew said, "Well, I am pretty sore at Colonel Marsters because he didn't let me know that he was going to make the raid on the Vernon," and he said that Colonel Marsters told him that when there was a raid to be made he would let him know; he said, "the colonel promised me that," and he said, "We talked it over, agreed that it would be easier for me, Mr. Agnew to get the warrant." At this time I saw Dr. Goodfriend give Mr. Agnew some money, and when he gave him the money he said, "We did not start the still until December 12th, and we had our first run on the mash December 19th," and he said, "It hasn't been a month yet since we started the still." And he says, "By the 19th of January we ought to have $1500 on hand". And the doctor told Mr. Agnew at that time that everything has been very quiet since the Vernon raid, but he said, "After this dies down I think there will be a rush." He said, "This can't last very long; this flurry will soon blow over." Then he told Mr. Agnew that they ought to get a new place to start operations. He said, "We ought to have a place where we can keep the stuff and barrel it", and he told Mr. Agnew at that time that he had almost one hundred gallons on hand and then the doctor said to Mr. Agnew, he said, "The night they raided the Vernon it was evident that somebody told the Federal men to search Room 2 or Room 7, and they understood Room 202 or 207," and he says, "There wasn't any such room there," and then he

told,—the doctor told Mr. Agnew that he had waited on the corner to get Carl; he said he didn't dare trust anybody else, because he wanted to see Carl first the night of that raid, so they wouldn't pinch Carl's car, too. And then Doctor Goodfriend talked to Mr. Agnew about running him again at the next election, and Mr. Agnew left then, and then the doctor called 925 again, and the doctor said, "Hello, Edith," and he says, "Where is Carl," and then the answer, he says, "Working, eh?" and he says, "Is everything all right?" He says, "Well, you go right on and keep your mouth shut, and I will see Carl some time today." Then along about 5:20 in the afternoon of the same day, on the 15th—

THE COURT: About how many days' conversations are there?

MR. McEVERS: There are a lot of them, if the Court please. They run clear down to the 11th of this month.

THE COURT: We will continue a little longer, then, I think. You may proceed, gentlemen.

A. About 5:20 in the afternoon of the 15th Mrs. Sorenson came in, and she said to the doctor, "They have the still." She says, "I took a taxi out to the school house and went out there," and said to the doctor, she says, "Shall I get a car and go out there again to the cross roads and wait there until Carl comes by, and keep him from going on down?" She said, "I don't want Carl's car pinched." The doctor said, "You go ahead and go out there," and he said, "They can't make you get away from the cross roads anyway." And

she said, "I don't know who in the world they got," but she said, "all I know is they got the still." But she says, "I don't know who they got out there at the still." That is all I have on the 15th. The 16th is the next date that I have.

Q. Was that through the door or over the detectaphone?

A. Through the door.

Q. All right.

A. This was the morning of the 16th, and I heard the doctor and Jack Smead talking. And Jack Smead came into the doctor's office, and I heard the doctor say, "Well, I will have to have bond arranged for him." And he said, "I am going to get it through Ensign & Ensign," he says, "It won't cost me anything." And the doctor in talking with Mr. Smead said, "I think the only thing for Ed to do is to plead guilty." And Mr. Smead said, "Well, we might be able to clear him, because they didn't catch him making the booze." And then I heard the doctor call 925. He said, "Hello, Carl. Is there anything new?" He says, "I am trying to rustle it for him now." He says, "You had better take a run up pretty soon, because I have to leave." Very soon Mr. and Mrs. Sorenson came in and when they came in they talked about Ed Kemp and talked about him being caught out at the still, and the doctor said, "Well, they caught him all right," but he says, "We don't want to let that discourage us; we don't want to be afraid because even if they did catch him, what we want to do is get another place and go right on," and the doctor said, "I

am trying to arrange a bond and as soon as Ed gets out I am going to have him come up to the office, and will talk matters over with him, and make him feel good." And then the doctor told Mr. Sorenson to go to the jail and see Ed and take him some tobacco, and he said, "Now, be sure and go when Mr. Kinney is there." And so Mr. Sorenson went to the phone and called 26 and asked for Mr. Kinney, and I didn't of course, hear what was said at the other end of the conversation, but he turned to the doctor and said, "Kinney will be in about one."

MRS. CURTIS ON WITNESS STAND:

A. And then the doctor said to Mr. Sorenson, "I think the best thing Ed can do is to plead guilty because," he said, "probably won't get more than three months if he does," and Mr. Sorenson said to the doctor, "Well," he said, "I don't know any reason on earth why I can't get Ed to give my plea," he said, "I only lived in room two a very short time" and Mrs. Sorenson said, at that time she said, "I pay Ed Hill $75 a month when I was at the Union Rooming House," she said. "Since I have been over at the Vernon I paid him a dollar a day."

Q. (By MR. SMEAD): Was that on the sixteenth?

A. Yes, that was on the sixteenth. And then Mr. Sorenson said, "Somebody at the White House knows I am making whiskey," and he said, "I would like to know how they found it out."

Q. (By THE COURT): Somebody at what house?

A. At the White House. And then on January 16, later in the day, Mr. Kemp came into the doctor's

office. The doctor said, "Well, Ed, how do you like the jail?" The doctor said, "I think the best thing you can do, Ed, is to plead guilty," he says "You will have two or three months, and oh, maybe two hundred dollar fine, that's about all you will get." He says, "Now I want you to say that this outfit belonged to you." And he said, "If anything comes up, Ed, about me having arranged to get the place from Evans"—he said—he said, "You could say that you came up and told me that you wanted a place for you and your wife and daughter, and I suggested that you get the Evans place because I knew Mr. Evans," and he said, "I knew about the place and so I just told you it would be a good thing for you to get that", and he said to Ed, "Now," he says, "we want to get these things fixed up so that our stories will jibe." And the doctor said to Mr. Kemp, "Now I am going to see to it that your wife doesn't want for anything," he says, "I told you when you went into this that if anything happened I would see she was taken care of." And Mr. Kemp said, "Well," he said, "when I was first picked up and —He said, "When I saw my wife the first thing she began and wanted—hollered about we wouldn't have enough eats if I was put in jail," he said, "I told her you promised you would take care of her if anything like that happened." The doctor says, "You bet I will," he says, "Of course, it isn't like I was not mixed up in the thing." The doctor said to Mr. Kemp, he says, "I don't want my name mentioned in this affair at all." Mr. Kemp says, "You can rest easy, it won't be, but," he says, "I am going to take all the respon-

sibility myself"; the doctor says, "Now, we are going to get another place and start operating right away." He says, "When you get out we will be able to use you again." He says, "If you want anything special to eat, while you are in, if you do get thrown in," he says, "All you have to do is to let Carl know and you will get it." He said, "Jim will be good to you while you are there." Then he told Ed they had been looking at another place, a certain place, as I understood him it was out near some flume. That was all that happened on January 16.

Q. (By MR. McEVERS): What was the next day then that you heard?

A. January 17 in the morning.

Q. That was at the door.

A. Yes.

Q. What did you get then?

A. Mr. Kemp came in that morning again. And I didn't see him again that morning, but he came in that morning. And then doctor told him, he said, "Now after this is all over I am going to use you again." He said, "We made a mistake this time." He said, "I used you on the inside. This time I am going to put you on the outside." He said, "We ought to have gotten away from that place before now." He told Mr. Kemp to go and see Jack Smead. That was all I got on the 17th. The next date is January 18th.

Q. (By MR. McEVERS): Now where did you get that?

A. I got it at the door.

Q. All right. What did you get?

Q. (By MR. CAVANEY): What time in the day was it?

A. This first conversation of January 18? I have it marked A. M.

Q. Any particular hour?

A. Not any particular hour.

Q. (By MR. McEVERS): Well, all right, read your notes.

A. This particular morning I remember because I have it marked here that I saw Mr. Sorenson go in. I was in Dr. Goodfriend's waiting room and I was talking to Dr. Goodfriend at this time. Mr. Sorenson came down the hall and passed the door and looked in but didn't speak, and the doctor motioned him and said, "Come in Carl, it is all right." And Carl came in and I went immediately into the office and went to the door and heard his conversation. I heard the doctor tell Mr. Sorenson that he was out the night before looking for another place. He asked Mr. Sorenson when their hearing came off. And he said, that we don't want to start—the doctor said, "We don't want to start up again until we get this thing all cleared up." He said, "This time we are going to try and get out on the second bench," and the doctor told Mr. Sorenson that Mrs. Sorenson was not likely to get more than six months. And then Mr. Sorenson said to the doctor, "Well, I am—just dropped in, and I am going on in now and see Mr. Smead." And just before he left the doctor said, "Well, the day they pinched the Vernon they would have got your car, too, if it hadn't been for me, because", he said, "I stood out there on

the corner and waited for you." And Mr. Kinney came into the doctor's office that same morning on the 18th, and when he came in the doctor said, "I was out looking at a place last night, Kinney," and he says, "Now your place would be all right in the summer time," but he said, "We will have to have one soon," but he says, "The first thing I want to do is get rid of Eddie, first, get him in jail, because," he said, "I am afraid Eddie was partially to blame for us being caught." He said, "It was somebody tipped them all right"; he said "I told—I promised Eddie I would take care of his wife." And then the doctor said to Kinney, he said, "I think this month we ought to have $1600 out of this", he said, "With what mash we have on hand now". He said, "If we could get this thing to operating good", he said "I can't see any reason on earth why we shouldn't make $10,000 a year." And then he told Mr. Kinney that Jim before he left called up and wanted to know if he should go. He says, "I told Jim to go on, that he couldn't do any good here." And Mr. Kinney says, "No," he says "Jim will side right in with you when he is here and then when he goes some place else will side in with somebody else." The doctor says, "I think I will drop Jim after this, because", he says, "with you in the office, Kinney, we won't need him any more." He says, "You will be there and will be able to tell me what is going to happen." Then he said to Mr. Kinney, "I will see you again and let you know how things go." And Mr Kinney left. That same day Mr. Sorenson came in and Mr. Sorenson told the doctor "That Tip wanted

his share." He says, "I have only got $4.00 to my name right now". He said, "I am not able to pay him." He says—the doctor said, "How much does Tip want?" Mr. Sorenson says, "He wants his share." The doctor says, "We won't give him a cent except what is coming to him." And then the doctor says, "Now, don't have him come up here because," he says, "I don't want him up here to the office," he says, "I don't see any use of letting him know too much." He says, "He doesn't know much about this, who all is in on it, and there is no use for him to know." Then he said to Mr. Sorenson, "I want you bring the receipt for that $500 bond," he says, "I think I will have to get it changed to a property bond," he said; "I had to go Edith's bond and Ed's bond and I am short, I need the $500." And then the doctor said, "Well, after we get started up again," he said, "I would like to Tip work for us again because," he says, "He doesn't know much about this and I would like to have him again." And the doctor told Mr. Sorenson, he said, "I don't see how we get things started for at least two weeks." And then Mr. Sorenson said, "Well,"—In the meantime he asked the doctor what they should do with Tip and he said, "I can give him a room, but," he said, "I can't afford to keep him and give him his board." He says, "The only income—" Mr. Sorenson said, "The only income we have now is from the rooms." He says, "I won't get a cent out of this business," and he said, "Besides I used my car all the time and by the time this is over it won't mean anything for me." Doctor said, "We don't want to start up again until this thing

is completely straightened out," and Mr. Sorenson said, "Well, I don't think they can jail Eddie on a property possession" and he said, "The still wasn't running at the time," and doctor said, "Well, I don't know about it," but he said "Jack is working on the case now and he will know," and the doctor told Mr. Sorenson "Go home and get the receipt and bring it back," and Mr. Sorenson left and very soon after he left, oh, I should say about a half an hour, Mrs. Sorenson came in, and she came in and she said, "I brought that receipt, you told Carl to bring up." Doctor said, "Well, I don't know, I guess I won't have the bond changed because", he said, "I was in to see Jack and Jack said the trial was to come off soon and there is no need going to the trouble of having it changed." He said to Edith, "I thought I would need this $500 because if they should happen to get Carl then I might happen to have the money." Mrs. Sorenson said, "If this thing is changed I will have to take this receipt up to Mr. Jackson myself, because he told me I would." Doctor said, "No, you can take it to Smead and he can fix it with Jackson." She said, "Mr. Jackson told me I would have to have two signers to a property bond", and she said, "I don't think your name should appear", she told the doctor she didn't think his name should appear as a signer. Mrs. Sorenson said to the doctor, she said, " I am sick of the rooming house business," she says. "It is a whole mess." She says "I put $4500 in that rooming house and I wish now I had put it in a farm." Doctor said, "Now, you don't need to get cold feet, this thing will soon

blow over and things will be stronger than ever after this blows over." And then the doctor said, "Well, how are you and Hill making it nowadays?" She said, "Hill told me not to keep any more girls up to my rooms," he told me he couldn't protect me if I did. She said, "Since this campaign has been on I am afraid my house might be quarantined," and she said to the doctor, Mrs. Sorenson said to the doctor, she said, "Here is this receipt", and doctor said, "Well, I was just—I will keep the receipt because if anything should come up I might need it, then I will have it." Mrs. Sorenson left. That is all I got that day.

The District Attorney thereupon withdrew the offer of the detectograph and all information obtained thereby.

MRS. MARIE CURTIS, a witness for the plaintiff, further testified as follows:

MR. CAVANEY: It is understood that she is reading the conversations she heard through the door.

MR. McEVERS: Yes.

MR. CAVANEY: Without the aid of anything?

Q. (MR. McEVERS): This one of the 19th, were you at the door, Mrs. Curtis?

THE COURT: It will be understood that you are not to relate any conversations that you may have heard by the use of the detectophone, simply those that you heard by natural means.

Thereupon, by the permission of the Court, counsel for the defendants were permitted to examine the notes from the witness, and the notes were then returned to her.

Q. (MR. McEVERS): Have you found the place, Mrs. Curtis?

A. Yes.

MR. HEALY: If the Court please, for the purpose of making an objection, I would like to ask the witness a question or two.

THE COURT: Yes.

Q. (MR. HEALY): Do your notes as you now have them in your hand on this particular occasion show that the conversation was heard through the door?

THE WITNESS ANSWERED AS FOLLOWS: I heard only one conversation through the detectograph, and I marked it. All the other conversations that I heard were heard through the door. About 11:30 on January 19th, Mr. Sorenson came into the doctor's office and he and the doctor talked about this man, Tip, and the doctor said, "I am going to raise some money for Tip tonight and let him get away. He can go home for a while. It is too expensive to keep Tip here. I would like to have him later to work for us. We will have to get rid of Eddie because I figure Eddie was to blame for the still being pinched." And Mr. Sorenson said to the doctor, "Well, I don't believe Eddie will be jailed." And the doctor said, "Well, if he is not we will have to pay his fine. If he is jailed, I will have to take care of Mrs. Kemp"; and then they discussed how much money they should give Tip and Mr. Sorenson said that Tip would get something else to do until they set it up again.

The next conversation is January 20th. I have it marked from 10:00 to 10:15 in the morning. Mr.

Evans came into the doctor's office. The doctor began talking to Mr. Evans then about the place that they had rented from Mr. Evans and I heard Mr. Evans say, "Well, I don't need to tell anyone or to say that anyone rented the place. I didn't bring that letter with me, as I didn't think you would need it." The Doctor said to Mr. Evans, "Well, one thing, Mr. Evans, our stories will have to jibe, I don't want my name mentioned in this." Evans said, "Well, I will just say that I told the man who rented the place that if things were not all right when I came down that he would have to give the place up. I don't interfere in other people's business; I keep my mouth shut." And the doctor said, "Jack Smead is this fellow, Ed's, attorney, and Jack Smead asked me what sort of a fellow you were, and I told him that you wouldn't do anything malicious to anyone, and especially if that one was in trouble. We are going to try and get Mr. Kemp out on possession. Ed was caught with the goods on him, and is going to say that he had rented the place himself and then sub-rented a room. Now, you don't need to mention the fact that I talked to you over the phone at all. You go over to the Yates Building. I would like to have you come up here again this afternoon, and I will have Mr. and Mrs. Kemp come up, and I would like to have you meet them. How in the world did the Marsters bunch find out that you owned this place?" And Mr. Evans said, "Well, my name is on the gate." I heard the doctor say to Evans, "I will give you a check for the balance of the rent up to March 1st."

Mr. Evans left and not long after that Mr. Kinney came in and the doctor said to him, "Mr. Evans has just been up here and he is all right. He isn't going to mention my name. I know that the Marsters bunch sent for Evans to find out who rented his place. We will have to get another place and get busy next week and get things lined up again."

Then they talked about getting things lined up for the campaign.

THE WITNESS: That was a mis-statement, may I retrace that statement. I looked at the notes wrong.

MR. MARTIN: Which was a mis-statement, that you wish to withdraw?

A. Just the last statement I made.

MR. MARTIN: About getting a new place?

A. Yes.

MR. MARTIN: That didn't occur?

A. That did not occur there. The doctor told Mr. Kinney they would have to get busy next week and get things lined up for the campaign. That was the statement I wanted instead of the other one. The doctor said, "If Jim was the right sort of fellow, it would be a lot better." The doctor told Mr. Kinney that Smith was an enemy of his, and he said, "I have never seen the man. Brown is an enemy of mine and I don't know why." The doctor and Mr. Kinney talked of getting rid of Andy, and the doctor said, "You will have to see that they let him go."

Mr. Kinney left and Mr. Sorenson came in. I heard the doctor say, "Come in, Carl. Mr. Evans was in this morning. Mr. Evans didn't go over and see the

other bunch until he came to see me first." Carl said, "Well, do you think that he is going to tip them off?" and the doctor said, "No, I don't think that he will; Mr. Evans said he wouldn't mention my name. Mr. Kinney was just in and we planned to get together and get things fixed up next week. We are going to line things up for the campaign. We have got to get rid of the present Mayor, and the whole outfit. Some of them have been doublecrossing us. We are going to run Claude Gibson for Mayor," and the doctor said they were going to run Mr. Kinney for something; I didn't get what it was for. The doctor said, "I saw Tip at the Whitehouse last night. I am going to get a check for him this afternoon sure. I want him to go home." Mr. Sorenson said, "Yes, he could go to Glenns Ferry and work there for a couple of weeks until they could get started up again; we must get him out of town." The doctor said, "Well, the whole Marsters bunch can't scare me out. My Bowery raising stands me well. I am not afraid of Jesus Christ himself." Mr. Sorenson said, "What time do you want me to come up this afternoon?" The doctor said, "I am going to be here practically all afternoon; so come up at any time. When we come up again, there are just going to be us three, just you and Kinney and myself. We are going to leave Jim out of it. Occasionally we will give Jim a tip to keep him friendly."

At about 12:45 when I came back from my lunch there was someone in the doctor's office. I looked in and it was Mr. Evans. I heard Mr. Evans say to the doctor, "I walked all the way down to the Boise City

National Bank to cash the check you gave me." The doctor said, "Well, I would rather not, Mr. Evans, I would rather not have my name mentioned at all in this. He asked Mr. Evans out to dinner with him that evening, and Mr. Evans declined, and said that he had to go out to his son-in-law's for dinner.

In the evening of January 20th, I came into my office somewhere near seven o'clock after I came from my dinner, and when I came there was someone in the doctor's office, and I looked in, and Mr. Hill was in the doctor's office. Ed Hill is one of the defendants. They were talking, and I heard the doctor say, "Well, Hill, I want you to lay off on my friends. I can have you canned in fifteen minutes if I want to. I was responsible for Mr. Briggs' dismissal. Jap Spencer's place is no good, no light, no air, and I am going back to the Whitehouse. When I go back there I don't want you bothering around there at all. Somebody has been doublecrossing us. We have suspected you but we are going to give you the benefit of the doubt. It smells mighty bad, and I want you to lay off." Hill left.

Mr. Sorenson came in soon after Mr. Hill left, and the doctor said to him, "Ed Hill was just up here. I told Ed that he would have to lay off my friends and keep away from them, and I don't think he will bother you any more."

The next date was January 22d. I have it marked about 11 A. M. Mr. Kinney came into the doctor's office and I heard the doctor say to him, "I think he ought to get busy and use your place to start up again."

And Mr. Kinney said, "Well, if we do that then I think we ought to get about one hundred chickens and take them out to the place and get things fixed up there and get some alfalfa in." Then I heard Mr. Kinney speak of somebody else being in on the place; somebody else seemed to have an equity in the place. I heard him say, "Somebody else has an equity in this and things will have to look right to them." I did not get the name of the man who had the equity.

The doctor said, "Well, after you get everything looking well out there then we will have the still put in. We are short of funds right now because I used my own and some of your money to raise bonds for Mrs. Sorenson and Ed. I paid off Tip, too. Tip worked hard." He said Tip didn't know much about things, and nothing about Jim being in on this, and he said, "I think we had better keep him after we start up again. We will drop Jim. I have enemies in Jim's office and I am going to try to get Jim to get rid of them. When will Jim be back?" Then they referred to Mr. Kinney's place again, and the doctor said, "I don't see how in the world, Kinney, that we are going to get out to your place; that is the only objection I see to it. It is too muddy to get out there." Mr. Kinney said, "You can go out in the morning when it is frozen over." The doctor said, "The trouble with that other place is that it is too close in." I don't know what place they referred to. Mr. Kinney left.

Mrs. Sorenson came into the doctor's office. This is the same date. I don't have the time marked. It was soon after Kinney left, but I didn't mark it down,

so I have no recollection of just how long after. When Mrs. Sorenson came in she told the doctor about a quarrel going on between her house and Rose's house, she says: "We have been having trouble. Mr. Hill, or Hill, has been mixed up in this, too. The doctor said, "Well, I had Hill up here and you don't need to be afraid of him; I told him to quit molesting my friends and to leave them alone. I told Hill I could have him canned in fifteen minutes if I wanted to. What we have to do now is to get this mess straightened out among ourselves. I think we will have to have a little peace meeting.

That is all that I have that day.

The next day I have is February 1st. I have not the exact time. I have it marked A. M. On January 25th I had gone to Twin Falls and I came back to Boise I think on January 30th. While I was away the Federal men had a key to my office. I started in again on February 1st. I haven't the time of day marked and I can't remember what time it was. At that time when I went to the door there was a woman in the doctor's office and she was talking to the doctor. I have identified her since that time. It was Etta Goldsberry. She said to the doctor, "My case would have come up before now if Mr. Delana had remained in office. Practically everything is closed up. There isn't very much doing." The doctor said, "Well, I wanted them every one to go easy and be careful until this spasm blows over. Now, I warned them of that man Webb. After I warned them then they let Webb in up at Sorenson's and Jim Kelly took a bunch up there

and Webb was in with them; they got a drink up at Sorenson's. Carl has not been careful enough."

MR. LANGROISE: I object to that conversation as not in the presence of either of the defendants, Carl or Edith Sorenson, and not binding upon them.

MR. MARTIN: And further, this Etta Goldsberry is not charged as one of the conspirators.

THE COURT: You may proceed. The objection is overruled.

MR. MARTIN: An exception.

MR. LANGROISE: An exception.

The doctor said to Mrs. Goldsberry, he said, "I went Carl Sorenson's bond for him," and Mrs. Goldsberry said, "Aren't you afraid Carl will skip?" and the doctor said, "No, I am not afraid of it." And he said, "This is Carl's home, and I know he is not going to leave. He has property here and this is where he is going to live. They filed an abatement against the Vernon house and it ruined Mrs. Sorenson since they did that. We ought to have things so organized that if one of us is caught all of us will have to help. We ought to have a fund of about $500.00 or more in case of emergency. I think this Marsters flurry will soon blow over. We must be careful and not trust strangers. Now, when I call up and give you a description of anybody and tell you to watch for them, then you must do that; you must watch for them." Mrs. Goldsberry said, "Well, Ed and I are being very careful. Whenever we have any booze around, Ed stays right on the job and watches. The doctor said, "Well, I told Ed to have the rooms where your caches were registered and regis-

ter them under a fictitious name. You know the Federal men can't go into a room and search unless they have the room number and the name of the occupant of the room."

That was all I got on that date.

The next date was February 6th, about 11:00 A. M. Mrs. Sorenson came into the doctor's office for treatment and I heard the doctor say to her, "Well, what is Carl doing now?" Mrs. Sorenson replied that he was doing nothing. The doctor said, "When does your trial come off?" Mrs. Sorenson said, "Well, Jack Smead told me that he thought it would come off about Monday." The doctor said, "Have you heard from Tip lately?" Mrs. Sorenson said, "Yes, I did. He is in Hammett now. Tip phoned me that he wanted $10.00. Tip says he owes a hotel bill and has to have it. Do you want Tip?" The doctor said, "Yes, just as soon as Ed Kemp's trial comes off and we can get this over with I would like to have Tip come back again; then we will cut the others out. There is no need of having so many in on it. Next month we will start up again. Now I am going in pretty soon to see Jack Smead about Ed Kemp's case." Mrs. Sorenson said, "I can't send Tip a cent because I haven't any money to send him. About all I have is just to keep me going. I could make a little something if I could keep a girl, but I am afraid of Hill. I think Hill double crossed us. I would like to know how Gill knew Kemp was going to be pinched a week before he was pinched." The doctor said, "I told Carl that I would send Tip some money and I told Carl to come up and get it, but he

never come up and got it. I don't want to write him a check." Mrs. Sorenson said, "Carl told me he asked you once about that money for Tip; you didn't give it to him then. Carl said he wasn't going to come up and see you any more about it." The doctor said, "You have Carl come up this afternoon and I will give it to him."

That was all for that day.

The next day was February 7th. I have no notes of what time of day it was. I don't know what time it was. Mr. Sorenson came into the doctor's office and the doctor said, "Well, I am going to give you that money for Tip. I want you to go and get a draft and send it to Tip." And then they began talking about Hill. The doctor said, "I think Hill had something to do with the Vernon being pinched." Carl says, "Yes, I think so, too, and what is more, I don't want anything more to do with Mr. Hill; I am off him and don't want anything more to do with him at all. I think Hill told George a lot of stuff and then I think George went and squealed about it. If I ever find out that 'bohunk' has squealed I will blow his head off if it takes me a hundred years to get him." The doctor says, "Well, it is certainly evident that someone has told and we will find out who it was when this trial comes off. I think it is due to jealousy in the bunch some place. George's wife is jealous of Edith; that is the reason. Well, you try and borrow some money from George to help you along." Carl said, "I will not, I will never ask him for a cent. If I find he squealed, I will get even with him." The doctor says, "You just lay off that kind of

stuff; that won't gain you anything." Carl said, "Well, I think George found out I was in with you and he is jealous of me."

That was all on February 7th.

My next date is February 8th. I haven't the time of day marked. I don't know what time it was. There was a man in the doctor's office. I heard the doctor tell someone in the doctor's office, I don't know who it was—

MR. MARTIN: We object to conversation of the doctor with somebody, she doesn't know, who it was as not binding on any of these defendants.

THE COURT: I think it would be binding on the doctor.

MR. MARTIN: Do you think it would be binding on the doctor?

THE COURT: Don't you think so?

MR. SMEAD: The difficulty about it is you can't tell until we hear the conversation.

THE COURT: Thus far it has been quite relevant. You may proceed.

A. I heard the doctor say to this man, "Somebody has been tapping my telephone line." The doctor said, "I am going to find out who it was." The man replied, "I don't think they could tap your telephone line without central knowing about it."

The engineer of the building came in and took the measurements of the door between the doctor's private office and our office; that is the door where the crack was. The next date was February 9th, but I have no conversation on that date. I saw Mr. Kinney and the

doctor talking together about eleven-thirty in front of Bailey's Cafe.

On February 11th about 10:30 I heard the doctor say, "Come in Griff," and Chief Griffith came in. I saw him from the crack over the top of the door. The door was not nailed up at that time. I heard Mr. Griffith say, "I hear that they are going to have me indicted before the grand jury; Lampert told me about it. Some woman that runs a rooming house has signed the affidavit to indict me. I think that the woman was the Mrs. Sorenson that runs the Vernon rooms. The doctor replied, "Well, Mrs. Sorenson is as crazy as a bat. I will call Carl right now and have him come up. Then I will find out if there is any truth about it." The doctor called 925 and asked for Carl. He said, "I want you to come up right away." Then the doctor said to the Chief, "I know that something is up. I am going to find out this afternoon all about it. I have my bond arranged for so if anything happens I am all set." Mr. Sorenson came in and the doctor said to Mr. Griffith, "You go out in the waiting room and wait out there until I get through talking to Mr. Sorenson." The doctor said to Mr. Sorenson, "Is there any truth in it that Edith has signed an affidavit?" Carl says, "No, there is not a speck of truth in it. Edith and I haven't been talking to anybody lately. We are minding our own business. The only place we have been going is to the shows." The doctor called Mr. Griffith in and Mr. Griffith came in and said to Mr. Sorenson, "Mr. Sorenson, is it true your wife has signed an affidavit?" Carl said, "No, she hasn't done any such

thing, because I know everything that my wife does and I know she didn't sign any affidavit." The doctor turned to the Chief and said, "You can depend on what he tells you, Chief; I have known these people a long time; I know they are all right and you can depend on what they say." The Chief said to Mr. Sorenson, "I hear that you sold Mr. Kelly and that fellow, Webb, some drinks at your place, sold them after it had been raided." Mr. Sorenson said, "Well, I have two men who will say that I didn't sell them any."

Mr. Sorenson and Mr. Griffith left and went out into the hall and they came into the hall very near my door, and I heard them talking there quite loud, and I heard Mrs. Sorenson join in the conversation in the hall. I heard Mrs. Sorenson say to the chief, "If I have to appear before the Grand Jury, Mr. Griffith, you can depend on me."

The next day was Thursday, the 15th.

I went to Colonel Davis' office and identified Etta Goldsberry as the woman I saw in the doctor's office on February first.

MR. SMEAD: Move to strike out that statement as incompetent, irrelevant and immaterial, what she did in Colonel Davis' office with reference to these defendants. Moved that the jury be instructed not to consider it.

THE COURT: Overruled.

MR. SMEAD: An exception.

WITNESS: Those are all my notes. I have not received or promised any money or compensation for testifying in this case or for gathering evidence.

MR. CAVANEY: Move to have it stricken out.

THE COURT: No. I think it is immaterial, but it might have been brought out on cross-examination. I will let it stand.

WITNESS: I have been married since December 30, 1916. My husband worked in a grocery store immediately after we were married and then during the war he worked in the shipyards, in the office of the shipyards, in the wooden and steel shipyards, at Vancouver, Washington. During that time we resided in Vancouver, part of the time and Portland part of the time. After he finished his work at the shipyards, we started then in evangelistic work. Mr. Curtis and I were singing for the churches. Mr. Curtis did the leading of the music and I did the solo work. We continued that work until last March. We finished up our work I think it was in the latter part of February last year in Twin Falls. At that time Mr. Curtis had to have an operation on his throat; so we had to quit singing and he was offered a position with the Mutual Building & Loan and accepted the position and came here about the middle of March, and since then we have been in Boise and he has been employed by the Mutual Building and Loan as District Manager for this district here. And prior to that time a number of years back when Mr. Curtis was in school, at that time, he did singing work most of the time.

ON CROSS EXAMINATION, MRS. CURTIS testified as follows:

THE WITNESS: May I have my other note book, please. I came to Boise somewhere near March 15,

1922. When we first came we lived on Jefferson Street, at the corner of Twelfth. We lived there several months and then moved to 1415 Franklin Street, and stayed there until about the middle of July. Then we took the office rooms in the Empire Building and moved in there and at that time I left and went to Oregon and did not come back until the latter part of November. I don't know the exact date we rented the rooms in the Empire building. Mr. Curtis rented them, and I think it was along in July some time, we rented the office rooms there. It was about the 15th. It was some time in July, I am sure it was in July. We didn't move into the Empire Building as living apartments at the time we rented the office rooms, and I left Boise about the latter part of August and went to Vancouver, Washington. My husband had occupied the rooms in the Empire Building as the office before I went to Vancouver. I did not live in the office or work in the office until I came back from Oregon. I returned about the latter part of November, then I established my residence in the room adjoining the office just west of the office. My husband occupied the one next to Dr. Goodfriend's office as a business office. I took care of the office when my husband happened to be out. The office next to Dr. Goodfriend's was the business office, and the one west of that was our private room. Dr. Goodfriend's office lay on the corner just to the east of his; that was his private office. The one just north of the doctor's private office was his waiting room. Through that room was the entrance into his private room. There was one

door that connected the two. You could enter his private room through our office. Dr. Goodfriend came through my office a number of times and went into his private office. I did not invite him to use my office. He walked in there and told me, "I forgot my key and left the key to my inner office in my other coat and I can't get in", and he unlocked the door between his inner office and our business office and went into his room. That was with my permission. The only other entrance to his private office was through his reception room. The door between our office and Dr. Goodfriend's private office was the one through which I listened and heard these conversations. The cracks through which I peeked were over the top of the door and also along the north side of the door. The crack did not extend the full width of the door over the top; only about half way. The door sagged on the south side. The crack over the top started about a good half inch wide, at the widest point at the south side, and gradually narrowed until it finally closed about the center of the door. The other crack was on the north side and extended the full length. At the top it was narrower. As it went down it was just about three-eighths of an inch wide; very near the same all the way down. At the top it was just a little bit narrower.

This door had a lock on our side. I don't know whether there was any lock on the doctor's side; I didn't look to see. When I looked over the top of the door, I stood on the arm of a little settee we had there. I stooped a little to see over. When I looked through

the north side of the door I could stand up straight. Finally, I sat on the couch and looked through there. There was a couch there and I sat on the edge of it, and could look through. Just as soon as I saw who was in there I put my ear to the door and listened very comfortably. I could hear better on the south side of the door. There was an opening on the south side but it was covered over by casing, and it created a sort of vacuum, and I could hear better on the south side of the door than on the north side. A great deal of the time I listened on the south side. I usually took the north side where I could both see and hear. I looked part of the time and listened part of the time. When I listened I put my ear to the crack. When I listened on the south side of the door I stood.

Looking through the crack on the north side I got a line of vision straight into the room. I could see a space there, an area of several feet when I looked in. I could see clear across the room. I imagine the area of vision was three feet. The further away from the door the wider the vision. The objects indicated in plaintiff's exhibit 26 as the patient's table and the desk and a little laboratory room are approximately the location of those objects in the doctor's private office.

I never visited the doctor in his office, not in his private office. I was in his waiting room a number of times; I went in there and talked to him, just visiting. This was several times. I went down the hall and he would speak to me, and say something and I would go back to the door and talk to him. The elevator boy used the doctor's waiting room in the evening to do

his studying there, and I would sometimes go in there and talk to the elevator boy about his lessons. I just went in to talk to the doctor when he spoke to me; that was all. I was not at that time spying or looking for information. I was not trying to find out anything at that time.

At the time I looked over the top of the door, I could see just a little bit of this end of the closet, but I could not see the opening. That is the southeast corner of the laboratory. I could see the doctor's desk in the northeast corner of his office. I could also see the b ook case in the southeast corner and I could see the east half of the room. I could see practically half of the office. It may have been slightly less than half. I could see down to the floor. I did not notice in particular whether I could see half of the office or not. I could see the doctor as he sat at his desk. I could see him sitting there from the floor up.

It was sometime before Thanksgiving, I think, that I returned and took up my residence in these offices. It was about a week before Thanksgiving. Our private room was not furnished for use at that time. There was just a couch in there and we used that the first night or so and then I went down and bought furniture and furnished my private room. Before I was married, I lived at Missoula, Montana, for about six years. I was born in the southeastern part of Missouri. From there I went to Kansas, from Kansas to Oregon and from Oregon to Montana. I lived in Kansas about two years. My father was in business there. I was married at Missoula. My parents were living there at

that time. Their names are Mr. and Mrs. D. G. Jones. I was in school before I was married. I was married at twenty years of age. Once in a while during my vacation I would work in the store. I am a singer, I had not gone on the circuits singing before my marriage. I had no business training. I was married in December, 1916. My husband and I established a residence at Clarkston, Washington. My husband was in a grocery store there. I just kept house. We lived there about a year. Then we went to Spokane, Washington. We stayed there less than a year. Mr. Curtis was in the grocery business there. I just kept house. We went from there to Vancouver, Washington, where my husband worked in the shipyards. I worked in a grocery store there during the war. Mr. Curtis had engaged in singing as a professional a number of years before we were married, but did not engage in until after his work in the shipyards in the latter part of 1920, I guess. Prior to our marriage he had engaged in singing in church work, singing for evangelistic meetings. After the work in the shipyards he and I traveled singing in evangelistic work. We were hired by churches. We did not contract with any evangelist to go from town to town, but we did go from town to town singing at revival meetings. We sang in Oregon, Washington and Idaho. The only place we sang in Idaho was in Twin Falls. That was last February. We then quit on account of the operation on my husband's throat. I came to Boise with my husband when he was employed with the Mutual Building and Loan Association. Mr. Curris has resigned from the Mutual Building and Loan.

Q. You say positively that he was not removed by the Secretary a few days ago when he was here?

A. No, sir, he resigned when he was—

THE COURT: You will be bound by her answer. It is immaterial.

MR. MARTIN: It is the ruling of the Court I will not be permitted to rebut this. Is that the ruling of the Court?

THE COURT: I think I will strike out the answer as being immaterial.

MR. MARTIN: May I have an exception, please?

THE COURT: Yes.

WITNESS: Mr. Curtis was singing in Twin Falls just last month. We sung in Oregon. We did not sing at Gooding recently.

Q. At whose meeting did he sing at Twin Falls?

MR. DAVIS: Objected to as incompetent.

THE COURT: Sustained.

Q. (MR. MARTIN): Has he been singing at the meetings of a Mr. Burger, a Ku Klux Klan lecturer?

MR. DAVIS: Objected to as incompetent, irrelevant and immaterial.

THE COURT: Sustained.

MR. MARTIN: If the Court please, we now offer to show by this witness that her husband—

THE COURT: Ask your question.

MR. MARTIN: The Court refuses to let me make an offer?

THE COURT: Yes.

MR. MARTIN: I would like an exception, please.

Q. (MR. MARTIN): Do you intend to say now

that your husband has not been singing at the meetings of Mr. Burger, the Ku Klux Klan lecturer?

MR. DAVIS: Objected to as incompetent, irrelevant and immaterial.

THE COURT: Sustained.

Q. (MR. MARTIN): Is your husband a member of the Ku Klux Klan?

MR. DAVIS: Objected to as incompetent, irrelevant and immaterial, and an effort to inject prejudice into this case.

THE COURT: Sustained.

MR. MARTIN: We would like an exception.

WITNESS: I heard the first of these conversations that attracted my attention along about the first of December. I cannot give the date. I wrote down at different times in December. I would jot down some little particles of conversation that I heard, but I did not put down any dates along the first of December. I have no notes of those conversations. I recopied those as I remembered what I heard the first part of December. I copied them down as they came to my memory along about the latter part of December. I went over to see Mr. McEvers and he asked me to sit down and make notes of things I had heard as I remembered them at that time. I haven't the original notes of those early conversations in December. I destroyed them. I destroyed them because I had copied them off and I didn't see any need of keeping them. I copied them into a note book at a later date and destroyed the original notes. I didn't use any notes when I testified in regard to the conversations in the first part of

December. The exact date of the first conversation I testified to was December 29th. I testified to conversations previous to that time, but I didn't give any date. I said it was along the first part of December. I cannot now fix the date any closer than that. The first conversation I heard Dr. Goodfriend and Mr. Kemp were present in Goodfriend's office. I don't remember of anybody else being in my office except myself. When the conversation between these men first attracted my attention, I was sitting at my desk in the southwest corner of our office room. I was sitting looking out of the window as I remember. My back would be toward the door leading into Goodfriend's office unless I swung around on the chair. I don't remember just how I was sitting; all I know was that I was sitting at my desk. The door between our room and Dr. Goodfriend's office was always shut. Our office room is quite narrow; I imagine it is about six or seven feet wide, probably seven feet. I never measured it. The desk sits against the west wall of the room, further away from Dr. Goodfriend's office. Sitting there at the desk I could hear what they were talking about when they raised their voices, and I heard the word "still" mentioned. I could hear the voices. When they raised their voices I could hear them quite plaintly. I could not hear all that first conversation when I was sitting at the desk. I went to the door, got up on a chair and looked in. That was the first time I ever looked over the top of the door. I could see through the side sometimes. As you walked back and forth you could see in there. I had not been

watching in there before that time. I had seen through before. When I passed there sometimes I could see through there. I was not looking in. I had not purposely gone there and looked in before. This was the first time that I had deliberately gone there and looked over.

I saw the doctor and I saw Mr. Kemp. I don't remember just where the doctor was sitting. I remember seeing Mr. Kemp near the desk. He was standing right at the west end of the desk. I don't remember where the doctor was. I remember especially where Mr. Kemp was because I took special notice of him. What especially attracted my attention to Mr. Kemp was the fact that the doctor was talking to him about a still, and that is the reason I wanted to find out who he was. I didn't know him at the time. The first time I found out his name was after he had been released from jail and he came into the doctor's office, and I heard the doctor say, "Well, Kemp, how do you like jail?" I saw him on the day last mentioned and recognized him as the man I had seen early in December.

The next conversation I heard was another conversation between the doctor and Mr. Kemp, the same man. He came back. I was in my office when Kemp came back. I don't remember what I was doing, only I know I was not sitting down when he came in. I heard somebody in the doctor's room and recognized it as the same voice; so I went back and looked over the door again. I peeped over the door. I didn't make any notes as to where the doctor was at this time in his office; so I don't remember. I don't remember where

Mr. Kemp was, but I am sure I saw him. I didn't see anybody else in there. I don't remember whether anybody else was in my office besides myself. There probably was no one. I have no recollection of whether my husband was there or not.

The next conversation was along in December some time. I do not remember the date. If I remember correctly, Mr. Agnew was there. I can't fix the time. I knew who Mr. Agnew was at that time. I had been in Boise during the primary election in August. I was not here at the general election. I voted in the primary election. I worked for a candidate in the primary election. I don't know whether I could say that I worked for him or not. I talked to some of my friends and told them who I was going to vote for and that I thought he was a good man. I did that for the purpose of securing their votes for this man. The man was Mr. Victor Jackson, Mr. Agnew's opponent.

Q. And isn't it a fact that it was generally known that Mr. Jackson was endorsed by and the candidate of the Ku Klux Klan for sheriff?

MR. DAVIS: We object to that as incompetent and immaterial.

THE COURT: What is the purpose of this, Mr. Martin?

MR. DAVIS: We are not trying Mr. Jackson.

MR. DAVIS: And not trying the Ku Klux Klan.

MR. MARTIN: Well, I don't know about that.

THE COURT: The objection is sustained.

MR. MARTIN: Very well. We would like an exception, please.

THE WITNESS: I talked to my friends and told them I was going to vote for Mr. Jackson and I continued that until the day the primaries closed. I saw Mr. Agnew's pictures around over town is how I happened to know him, and I saw him on the street a a few times. I heard Mr. Agnew and saw him in Dr. Goodfriend's office in December. He was in the doctor's private office. I was in my office when I heard him, but I don't remember whereabouts I was. I don't remember what I was doing. I did not recognize Mr. Agnew's voice at first; I was not familiar with his voice then. I went and looked to see who it was on account of the conversation I heard at that time. I stood up and looked over the top of the door. I don't remember how long this conversation between Agnew and Dr. Goodfriend lasted. I don't remember approximately. I stood there and looked through the crack until I found out who it was and then I got down. Then I stood at the right hand side of the door which is the southside; that is where I could hear better. I stood with my side to the door and my ear to the door; my right ear.

Q. Did you have your hair coiled down low over your ears?

A. Yes, I did.

THE COURT: No, you needn't answer that.

MR. DAVIS: I think that is trifling.

MR. MARTIN: I don't know. It would interfere with the sound.

MR. DAVIS: It is improper cross-examination.

THE COURT: I have ruled.

MR. MARTIN: I would like an exception, please.

THE WITNESS: I stood there and listened during the remainder of the conversation. I didn't see anyone else except Dr. Goodfriend and Mr. Agnew. I don't remember whether there was anybody else in my room besides myself; I think not. I don't remember where Dr. Goodfriend was in his office nor where Mr. Agnew was. I do remember distinctly the words that were said. I didn't hear all of the conversation. There was parts of it that I didn't hear. When they talked real low I could not hear them. I could hear an ordinary conversational tone. Part of this conversation was conducted in lower than the ordinary conversational tone.

The next conversation I heard was sometime the last part of December. I cannot fix the date. I think I said something near the 28th, but I didn't make it definite. I did not make notes of that conversation; I never made any notes of that conversation. I depend on my memory entirely for that conversation. What first attracted my attention to Dr. Goodfriend's office that day was that I heard somebody in there talking. I don't remember what it was that attracted my attention, the first words I don't remember, but I do remember getting up and looking in there and I think that was the time I saw Mr. Sorenson in there. I looked over the door standing in the same position. I don't recall that I had ever seen Mr. Sorenson before. I didn't know then it was Mr. Sorenson. I don't remember just when I did learn that it was Mr. Sorenson. If I remember—I couldn't tell you who first told

me it was Mr. Sorenson. Somebody told me. I found out, because I made it my business to find out who he was. I inquired as to who he was. I don't remember from whom I inquired. I asked my husband his name. He didn't know. I don't remember who else I asked. I don't remember how or by whom I finally found out who he was, but I do remember that after that the doctor called him by his name, by the name of Sorenson. That was not in this conversation, however. That conversation lasted just a few minutes. I don't remember whether I heard it all or not. I put down the things I remembered hearing. I told you I put it down afterwards, but I did not refer to those, when I gave my testimony on those notes. The conversation took place in the latter part of December, and it was only a few days after that when I wrote this conversation down, but I did not use the notes in my testimony. I have the notes of that conversation, but I did not refer to them. I just looked over the door long enough to find out who it was, then I stepped down and put my ear to the side of the door at the south side. I don't remember what part of the office Dr. Goodfriend was in. I don't remember whether he was sitting or standing. Mr. Sorenson was near the desk. Near the southwest corner. As I remember, he was standing up. I don't remember any other conversation on that day except this one with Mr. Sorenson. I don't remember whether there was anyone present in my room besides myself. I think there was no one else.

The next conversation was in the last part of Decem-

ber. I think it was probably the next day after the one just related, or very near there, I don't remember just exactly. I testified on direct examination that I started using my notes as of date December 29. The next conversation I heard was between Dr. Goodfriend and Mr. Agnew. That was the conversation that I put down. The one on December 29th was between Mr. Griffith and Dr. Goodfriend. I do not remember whether it was the 29th or when it was that I heard this conversation between Mr. Agnew and Dr. Goodfriend. It was some time along the last part of December. It was not later than the 29th. Mr. Agnew and Dr. Goodfriend were present. I don't remember where I was in my office when I first heard them in there. When I heard them I looked over the door again. I recognized the voice when I heard it this time because his voice was deep and I remembered it. I looked through the door and knew Mr. Agnew. I don't remember how long the conversation lasted. I don't remember what position Dr. Goodfriend was in nor Mr. Agnew either. I don't remember whereabouts in the room these men were or whether they were standing or sitting. I remember part of their conversation. I don't pretend to give all of that conversation.

The next conversation occurred on the 29th. That was the first one I made notes of. The previous conversations occurring in December I testified to without the use of any notes and from my recollection. In answer to the District Attorney's questions, I said at this point that I could not give the substance of the

conversations beginning on the 29th without referring to my notes. I can remember those earlier conversations in December clearly and can give them without the use of notes because I wrote them down soon enough and then I looked them over and was sure I had them in my mind before I came to the stand. I wrote down those conversations that I had heard the first of December. I also wrote down the later ones I heard immediately after the conversations. I have not studied them over later. I had the notes of the earlier conversations. I studied the latter completely. I looked them over because I didn't expect to be able to use my notes on those. I took down those notes sometime after I heard the conversations. I wrote down my recollections and then I looked them over. I wrote them down some of them two weeks after I had heard them. I wrote them down as I remembered them and they were very clear in my mind when I wrote them down. Before I had the conversation with Mr. McEvers along about December 29th, I had jotted things down on books and envelopes and little pieces of paper, and I collected them and then wrote them down and made complete—I had studied those over carefully because they took place the first part of December.

Q. And by means of having studied them so carefully you are able to give them now without the use of your notes.

THE COURT: She has been over that several times; we won't pursue it any further.

MR. MARTIN: I now move to strike out the tes-

timony in regard to the conversations as testified to in December, before December 29th, on the ground that the evidence of the witness shows that they are not her recollection of the conversations, but her recollection of notes which she made sometime, two weeks or more, after the conversations, and which she studied over carefully, and it shows that she is testifying to her recollection of her notes instead of her recollection of the conversation.

THE COURT: The motion is denied.

MR. MARTIN: We would like an exception, please.

THE WITNESS: On December 29th, Mr. Griffith called at Dr. Goodfriend's office. I had never seen the Chief of Police before that I remember of. I didn't know who he was when he entered, only doctor said, "Come in, Chief", and there was someone else in the room, and I asked him who it was. Mr. Kuchenbecker was in the room with me. I asked him who it was and he told me. When Mr. Griffith came into Dr. Goodfriend's office I was standing at the north side of the door between Dr. Goodfriend's office and my office. I looked through the crack there and saw Chief of Police. When he first came in I could not see him, and then he moved within radius of the crack I saw him. Mr. Kuchenbecker was at the top of the door looking over the top and I asked him who it was and he whispered it was Chief Griffith. I don't remember how long Mr. Kuchenbecker stood up there and looked over the top, I don't remember whether he continued to stand there during all of the conversation. I continued at the north side of the door during the

conversation. I put my ear to the crack after I saw who it was. I looked part of the time and then listened part of the time. I guess Mr. Kuchenbecker did the same, I don't know. We stayed at our posts until Mr. Griffith went away. I don't remember the length of time of the conversation especially. I know it was about two o'clock in the afternoon when he came and I didn't make any notes of the time when he left. There was nobody else in my office beside myself and Mr. Kuchenbecker. I don't remember who was in the other room. I didn't see anybody else in Dr. Goodfriend's office but the doctor and Chief Griffith. I don't remember whether Dr. Goodfriend was standing or sitting. I suppose he was walking around because I could hear people in there walking around. I could see them when they would pass the radius. I saw the doctor and Griffith when he came in and walked by there. The only time I could see them was when they passed this line of vision.

The next conversation was January 4th.

I heard nothing in there between December 29th and January 4th. On the last mentioned day, I heard a conversation between the doctor and Mr. Kinney, and that was the first conversation I had heard between the doctor and Mr. Kinney. I had never seen Mr. Kinney before. I just heard the doctor say, "Come in, Kinney." I made further inquiry to ascertain who he was. I inquired of Mr. Paul Reynolds, one of the agents in Mr. Marsters' office. At the time Kinney first came in, I was in the private room first, and Mr. Reynolds was in there with me, and we were listening over the

detectograph, and I didn't give any of that evidence; I was in the other room. Whether Mr. Reynolds came out when I heard this conversation, I don't remember. He was in our living room. When I came out I went to the north side of the door and looked through the crack. They were not in the line of vision when I looked through the crack. When I first went in I didn't see who it was, I just heard the doctor say, "Come in, Kinney", and then I saw the man there in the room. He walked across the room south. He was within the line of that vision when I saw him just about the southeast corner of the patients' table. I did not see anybody else in there except the two of them. I didn't look over the top that day. Mr. Reynolds told me that day who Kinney was. After they finished their conversation I went out in the hall to look at Mr. Kinney, to get a good look at him and came back to give him a description of the man. Paul Reynolds didn't go out. I don't remember whether he looked over the top. I don't remember whether there was anybody else in our office beside myself and Mr. Reynolds. I heard another conversation that day. I have no recollection of that conversation independent of my notes. I made notes after the conversation, just immediately after the conversation. I would not know without looking at my notes whether or not anybody else was there on that day. I would have to look at my notes to ascertain that. I am just going along where Kinney is now; I can't tell you without looking at my notes whether anybody else came in on that same day. Somebody else came in, but I don't know

who it was. Mr. Agnew came in. I didn't make any notes of the time of day. There was only one conversation that I listened to over the dictophone. There was only once that I ever took down notes of a conversation. I haven't read the notes of that conversation. I don't remember where I was on January 4th when Mr. Agnew first came. The first thing that attracted my attention was that I heard him talking. I was in the office. I don't remember just the spot. I don't remember exactly what I was doing. I went to the north side of the door to listen. I didn't peek over the top that day. I just listened in. I didn't look in that day; I just listened. I didn't hear any other voices in there except Mr. Agnew's and the doctor's while Agnew was in there; I have no recollection how long that conversation lasted. That was the day the note was mentioned—the note that Mr. Agnew said he owed at the bank. The amount of the note was not mentioned and the bank was not mentioned. I don't remember who was present in my room at that time. I don't remember whether anyone was there besides myself. I have no notes of anybody being there. It was not my custom to make notes of the persons present at the conversations. I think twice during the time I made notes of who was present but I didn't do that afterwards. I wrote out this conversation of January 4th just as soon as the man went out; just as soon as Mr. Agnew left, I sat right down and wrote out my notes. There were two conversations on that day, one between Dr. Goodfriend and Mr. Kinney and one between Dr. Goodfriend and Mr. Agnew. I don't remember whether one

was in the forenoon and one in the afternoon or not. I didn't make any notes of the time of day. I don't remember, independent of my notes. Both conversations may have been in the forenoon or both in the afternoon. I don't remember what time of day they were there. I could not remember how far apart the conversations were. I wrote the notes of the conversation that took place with Mr. Kinney and the doctor after Mr. Kinney left. I wrote the conversation between Dr. Goodfriend and Mr. Agnew after Mr. Agnew left. I remember that I always did that; that was my custom. As soon as one left, I sat down and wrote out my notes. I did that after each one.

Q. Do you have any independent recollection of that other than what was your custom?

THE COURT: She has answered that two or three times.

MR. MARTIN: I don't recall that she has, your honor.

MR. DAVIS: That is objected to as repetition.

THE COURT: Sustained.

MR. MARTIN: We would like to have an exception, please.

THE WITNESS: This conversation between the doctor and Mr. Agnew is the one when I did not see them. I sat on the edge of the couch during all the time Mr. Agnew was there. I often spent time these days listening into Dr. Goodfriend's office when there wasn't anybody there, listening, waiting for someone to come in. Between December 29th and January 4th I had listened in at different times. I was on the look-

out for people when they came in. I listened whenever I heard anybody in there. I don't remember how much time I spent there. I wouldn't listen very often if I found nobody was in there. Sometimes I would go there and stand and listen to see if I could hear anything; quite often I did. When I didn't hear anybody, I wouldn't stay. I don't remember whether such occasions would amount to several times a day or not. I have no recollection of that. There was part of the time during this part of January I was very busy at other things, and sometimes the first of the month, from the first to the tenth of the month, I would just get conversations that I could. I first went over to confer with Colonel Marsters the latter part of December. I didn't talk to Colonel Marsters myself then; I taked with Mr. McEvers at first. That was not the first person in the employ of the Government I had talked to about this matter. The first person I personally talked to I think was Mr. Kuchenbecker; that was December 29th when I first met him. My husband had talked to a Government agent prior to that time. I don't know how early. My husband was not in the employ of the Government or of these Government agents. He had no employ from either the District Attorney's office or Colonel Marsters' office. He had gone to see them; he told me that he had gone over there and talked to them. He told me he had been over there in December. I don't remember whether it was the early part of December or not. It was along the latter part of December that he talked to them. At that time an arrangement was made for myself and

my husband to gather this evidence for the Government. We were to have no remuneration for that. My husband was to have absolutely none. There was nothing talked about remuneration at all. Neither of us expect any remuneration. I have never engaged in any of this class of work before. I never did any detective or semi-detective work before. I don't know whether my husband had or not. To my knowledge he hadn't. After the time in December when we took the matter up with the agents of the Government, part of the time the agents were in there in our room; so naturally we talked about it. They spent a large part of the time there. Miss Taylor was there a great deal of the time. Mr. Reynolds was there some of the time and Mr. Kuchenbecker was there, and different ones were there. I don't remember just which —Colonel Marsters was never there while I was there. My husband was busy most of the time. I don't think he listened in very many of them. He did listen in on some. Once he was listening at the door when I was there. That is the only time I remember him being there any time while I was. Colonel Davis was never in my rooms. Mr. McEvers didn't listen in on any conversation at all. The only Government agents besides those mentioned that I know of listening was Mr. Nickerson. I was doing this work without any hope of reward. I didn't have any idea of any. My idea was that if a person was breaking the laws of the Government they should be exposed and I wanted to assist in exposing them. It was not my intention to perfect myself so as to enter the detective work or the service

of the Government. Neither I nor my husband had any application pending to enter the detective service of the Government. I expect to go back to singing. My husband is not back singing right now, but he will start the first of March. Something along the first of March we are going to go back east and start singing. The only reason we are here now is just because we are kept here in this case.

The next conversation I heard was January 5th.

Mrs. Sorenson participated in this conversation. I hadn't seen her before.

Q. Do you have to refer to your notes to ascertain that?

A. In all testimony of these meetings I have to refer to my notes to answer. There was another conversation but I didn't know the man. Then there was a conversation over the telephone. That was Dr. Goodfriend's conversation. I don't remember where I was when this conversation started nor the time of day. I had listened that day before at different times, and was listening in at the time this lady came into the office. I heard her come in. The first voice that I heard—Mrs. Sorenson came in and made the remark she was so nervous I don't remember where the doctor was when I saw Mrs. Sorenson. I saw her pass when in my range of vision and I was at the north part of the door looking through the crack. I didn't hear anyone else or see anyone else in there except Dr. Goodfriend and Mrs. Sorenson at that time. I don't remember whether anyone else was in my office at that time. I have no note of anyone else. I stood there

by the side of the door during all the time that Mrs. Sorenson was there. She walked in and I saw her pass within my range of vision.

I have no conversations on the 6th, 7th or 8th. I don't remember whether I peeked in at times during these days. It was my custom to listen in every once in a while. On January 9th along in the evening, somewhere near 7 o'clock, there was a conversation between Ed Ward and Dr. Goodfriend. I saw them. I looked over the door that evening. They were in Dr. Goodfriend's office. I don't remember where they were standing. I had seen Mr. Ward a number of times driving taxis around the streets. I knew who he was. I don't remember how I knew who he was, but I knew who he was. I knew him some time before and recognized him that evening. I think I was the only one in our office. I have no note of anyone else. Generally when I was alone I got up and looked over the top of the door, and I remember doing this that night so that I could get a good look. My notes do not show I looked over. I heard conversations on the evening of January 10th. My notes say from six to nine-thirty. There were a number of conversations that evening. The first one I heard the doctor talking over the telephone When he first came in the phone rang and he answered and said, "I want to see Carl." That was the only name I heard the first part of the conversation over the phone. Later in the evening I heard him talk over the telephone a second time. Between these telephone conversations Mr. Sorenson came in. I didn't see him when he came in, but I

heard the doctor. They were in the waiting room, the north room. I heard the doctor call him Carl, and I knew the man's voice pretty well and I recognized his voice. I didn't see Carl that time, but I heard him, I didn't hear all the conversation they had in the north or outer room; part of it was in the office. I looked through the door at the north side. I did not see Mr. Sorenson. I saw another man come in, Mr. Kinney. There were three of them and a woman. I don't know who the woman was. I didn't see her. I didn't know her voice. I don't remember who it was. They were all talking together and I could hear a woman's voice pipe up occasionally, but I didn't know who she was because they were all very excited. Mr. Sorenson came in first, then Mr. Kinney and in company at the same time I heard a woman talking. I don't know whether Mr. Kinney and the woman came in together but I heard them talk. I didn't see anybody in the inner office but Mr. Kinney and Goodfriend, but I heard Mr. Sorenson very near the door. It sounded very near the door, but I didn't see him. I was looking through the north crack of the door. When I saw them they were very near the door within a few feet from the door between my office and Dr. Goodfriend's office. I could see them clearly. As I remember, I think Miss Taylor was in there with me that night. I couldn't see for sure but it seems to me she was there. I haven't it in my notes that Miss Taylor was there. I could not say definitely. I don't remember whether there were others in my room. Some of the Government agents were probably there. I think probably

Mr. Kuchenbecker was there that night. I don't remember definitely. I heard only these four in the doctor's office.

The next conversation was January 11th between Mrs. Sorenson and the doctor. I saw Mrs. Sorenson. I was looking at the north side of the door, and I don't remember whether there was anybody else in my office at that time. My notes don't show anyone else there. I was at the north side of the door during this conversation. I didn't see or hear anybody else in the doctor's office besides the two mentioned.

The next conversation was on the 13th. I didn't put down the time of the conversation between Mrs. Sorenson and the doctor on the 11th. I have no recollection as to whether that conversation was in the forenoon, afternoon or evening.

On the 13th I just heard telephone conversations. On the 14th I heard conversations. I have it marked from 10 to 1; so it was along—They weren't there all that time. Part of them were there. They came in and out I suppose. That is the reason I marked it that way. Mr. Sorenson came first. Nobody else came in while he and the doctor were talking. I didn't see anybody come there while Mr. Sorenson was there. I have it marked in my notes that I was alone during this conversation. I remember listening at the south side of the door and I looked over the door after each one came in to see who they were. As each one came in during the day I would get up and down to see who they were. I looked over the top at Mr. Sorenson and listened at the south side and a while after Mr.

Sorenson left Mr. Ward came. This was on the 14th. I imagine it was a half hour after Sorenson had gone that Ward came in. Mrs. Sorenson came in after Ed left. Just a little while after. By Ed, I mean Mr. Ward. I was alone during the time the conversations took place. I made the notes of the conversation after each one left. I happened to mark my notes at the top ten to one because I was there—because it was on Sunday and the doctor very seldom stayed any later than one o'clock on Sunday. I didn't mark the time when I started to write my notes first because I was writing there at the door all the time. I just stayed there at the door and wrote the notes when one left and was ready for the next one. In the notebook I have white sheets and yellow sheets alternate most of the time. The yellow sheets were originally in the book. They do not alternate all of the time because some of them I have torn out. I account for the sheets containing the account of December 29th having been torn out and then pinned in again in this way: Very often when I was at the door I could just tear a sheet or so out of my book and sit down by the door and have them handy so that if I could get a chance to jot them down I had it at that time. Sometimes when my note book was not handy I had a piece of paper there. The sheets are out of this note book, however. I tore them out before I wrote the notes and then pinned them back in. This is true of the other places where they are pinned in.

The next conversation I heard was on January 15th. I cannot tell without referring to my notes who was

present. I can't answer any of the questions in regard to these conversations as to who was present and what occurred, accurately, without looking at my notes. I absolutely could not give the dates and who was present without looking at my notes. That is true of all of the conversations since December. This statement refers to the conversation of December 29th and afterwards. I have to look at my note book for all the conversations after that date.

THE COURT: That is one thing—tell anything about it. She said she couldn't tell the dates or the names—

MR. MARTIN: Of the persons or accurately anything about it.

THE WITNESS: Accurately about the dates and the people who were there, I have to refer to my notes to find out. I might tell you some little piece of conversation that I don't have down in my notes, that I don't remember. I couldn't remember to any extent without the use of my notes at all. I do refer to all of my notes to answer all of these questions.

At the conversation of the 15th, the first I heard in the doctor's room, I heard him call a number. The doctor was alone then. At least I didn't hear anybody else in there. Mr. Agnew was the first one I heard in there. Mrs. Sorenson came in that day, too, in the evening of that day. I don't remember the time Mr. Agnew was there. It was sometime during the morning or toward the early part of the afternoon. Mrs. Sorenson was there the latter part of the afternoon, I can't say how late. When Mr. Agnew was

there I didn't see or hear anyone else except Mr. Agnew and the doctor. I saw Mr. Agnew that day. I think Mr. Kuchenbecker was with me when Mr. Agnew was there. At that time I was at the north side of the door. That is where the crack is and where you can see. I looked and listened both. When I saw Mr. Agnew he was just east of the east end of the operating table, right within my range of vision. Some times I could see Dr. Goodfriend's operating or patients' table, and sometimes he moved it around. It was at different places. I didn't draw this diagram, plaintiff's exhibit 26. I had absolutely nothing to do with the drawing of it. I saw the operating table once in a while. I can't tell you how often I saw it. Mr. Kuchenbecker was looking over the top of the door. I saw him. I don't know how long he stayed there and looked over. I don't remember whether he stayed there as long as I did or not. I listened there until Mr. Agnew went away. Mr. Kuchenbecker is the only one I remember of being there that day. I saw Mrs. Sorenson when she came in in the evening. I was standing at the north side of the door looking through the crack. I don't remember whether anybody else was at that time in the doctor's office except Mrs. Sorenson and the doctor. Mrs. Sorenson was just about the same place when I saw her, just east of the table. She and the doctor were talking in loud, excited tones, especially Mrs. Sorenson. I got practically all of that conversation. I didn't see or hear anybody else in the doctor's office at that time except these two.

The next conversation was on the 16th. The doctor

and Jack Smead were present in the doctor's office. I don't remember anybody coming in at the time Mr. Smead was in there; I mean my notes don't show anybody coming in.

Q. As I understand, all this testimony is from your notes and not from your recollection?

A. This is from my notes . I saw Mr. Smead. The first time I saw Mr. Smead was when I saw him out in the hall. I went outside and saw him and then I saw him later in the office. I first saw him in the hall talking to Dr. Goodfriend. That day I looked over the top as I remember. I don't remember the exact place Mr. Smead was in the doctor's office. I can't remember definitely whether there was anyone in my office besides myself. There is no reference to that matter in my notes. I also saw Mr. and Mrs. Sorenson there that day. I didn't mark down the time; I don't know what the time was. It was after Mr. Smead. The Sorensons were together. I don't remember whether anybody else was with me or not. My notes don't show anyone. The doctor and Mr. and Mrs. Sorenson were the only ones I saw or heard in there talking at that time. I saw them from the north side of the door. I don't remember what place Mr. and Mrs. Sorenson were. I just saw them pass the range of vision. When they passed I recognized them. I said I didn't know whether anybody else was in my office except myself. I say my notes don't say so. Mr. Kemp was also in on the 16th. It was after the Sorensons, but I do not have the time marked down. I don't know whether it was in the forenoon, afternoon or evening. I saw Mr. Kemp. He

was at the north side of the door. I saw him in the same place as I saw the others, in the same line of vision.

Q. Was anybody else there beside you?

A. My notes don't show that anyone was there.

Q. Can we assume that your notes are correct or not?

THE COURT: What do you mean by that, Mr. Martin?

MR. MARTIN: If he had been there, her notes would have shown it. If they don't show anybody there, that nobody was there, that is what I mean.

A. No, I didn't put down that anybody was with me. Once or twice I did put down such notations, but I didn't keep it regularly, so you can't depend on that because my notes don't show whether the other fellow was there or not. Once or twice it does show, I think twice. Where my notes don't show, I am not able to say definitely. In this instance I have no recollection of anybody being there.

The next day I have is the 17th day of January. Mr. Kemp was there that day. I didn't see anyone else except Mr. Kemp and the doctor. I have the time marked down A. M. but not a definite time. I don't know whether anybody else was in my office with me or not. My notes don't show that there was. I saw Mr. Kemp from the north side of the door. I don't remember where he was when I saw him or whether he was standing or sitting, only I saw him from the range of vision. He would have to pass there for me to see him. I have no record of any others on that day.

On January 18th A. M. Mr. Sorenson first visited the doctor's office. Mr. Kinney was next. Then Mr. Sorenson came the second time, then Mrs. Sorenson came. When Mr. Sorenson first came to the doctor's office he came into the doctor's waiting room. I was there in the doctor's waiting room at the time he came in. Those two are the only ones in the doctor's office at that time. I have no record of anybody being in my office excepting myself at that time. I saw Mr. Kinney from the north side of the door. At the time Mr. Kinney was there I didn't see or hear anyone else except he and the doctor. I have no record of anybody else being in my office at the time. When Mr. Sorenson came again I didn't see nor hear anybody else there except he and the doctor. I have no record of anyone being in my office except myself. I saw Mr. Sorenson from the north side of the door. I don't know whether the doctor or Mrs. Sorenson were sitting or standing. I have no record of it. I didn't see or hear anyone else come with her. I have no record of anyone else being with me; there may have been. I saw Mrs. Sorenson from the north side of the door. She was in the same line of vision as the others. They would have to pass that line of vision for me to see them. That line of vision is two or three feet wide. The next conversation is on January 19th.

Mr. Sorenson came that day, but I have no record of anyone else. I saw him through the north side of the door, and listened through there. Sometimes I would shift my position and go to the other side. I stood at the north side of the door all of this conversation.

The next date is January 20th in the morning. Somewhere around ten o'clock. I saw Mr. Evans first that day; then Mr. Kinney came, then Mr. Sorenson; then Mr. Evans, and then in the evening Mr. Hill. I had never seen Mr. Evans before. I didn't know who he was. I met Mr. Evans in the hall out here just a few days ago, and recognized him there. That was not yesterday I met him. That was several days ago. My husband introduced me to him.

CROSS-EXAMINATION

MRS. CURTIS BY MR. MARTIN

I saw Mr. Evans from the north side of the door. Mr. Kinney was the next one to come. I believe it was sometime in the forenoon. I listened from the north side of the door. I heard both conversations with Mr. Kinney and Mr. Evans. Mr. Sorenson was the next one to come. Mr. Evans following Mr. Sorenson, and after Mr. Evans Mr. Hill came in the evening. This was the first time I had seen Mr. Hill. I described him to Mr. Kuchenbecker, who told me that he thought it was Mr. Hill and I later identified him in the Court since this trial began, Mr. Kuckenbecker pointing him out to me. I did not see anyone else in Doctor's office while Mr. Hill was there. I did not come into my room until about the middle of the conversation, so I do not know how long Mr. Hill had been in the doctor's office prior to that time, which was about seven o'clock in the evening, when I came to my room and he left a very short time after that. When I went out for my meals, there sometimes was someone else there to listen, as the government officials

had keys to my office. It was not my intention at all to have someone there to listen at all times. Sometimes they came in while I was there; sometimes they didn't. I don't remember at all times when they were there. I saw Mr. Hill that evening when I was standing up, looking over the door. I don't remember whether there was anyone else in my office with me at that time or not; I have nothing in my notes of this. I saw nobody else or heard nobody else at that time. Don't recall where Mr. Hill was in the office. The doctor in his conversation that evening with Mr. Hill threatened Mr. Hill that he would dismiss him if he did not let his friends alone. Doctor said he could have him canned in fifteen minutes. I heard Doctor call him Ed in the conversation. I knew Ed Kemp and this was another Ed. I do not know whether I listened on the twenty-first or not; I don't remember; I have no notes. I do not remember whether there was any days after the twenty-ninth of December that I didn't listen; I do not recall any. The Federal Officers did not give me any instructions. They knew I was working on the case and I guess they did not think it necessary for me to receive any instructions. Now, on the twenty-second, Mr. Kinney came in. Mrs. Sorenson came later. I did not see anybody else in the Doctor's office while Mr. Kinney was there. I was listening at the north side of the door, where I generally was. I would watch from this same point until I got a good look at them, and if they hadn't walked I could not have seen them, but they generally moved about. I don't know whether there was anyone else with me at

that time or not. I didn't make any record whether anybody was with me or not. I saw Mrs. Sorenson when she was in the room, from the same point that I saw Kinney. Did not see anyone else in doctor's office on that date. Now I did not see anyone else until the first of February. I was in Twin Falls from the twenty-fifth to the thirtieth of January. I went down there to see my husband. I sang several solos.

Q. Did you sing for Mr. Burger?

MR. DAVIS: That is objected to as incompetent and immaterial.

THE COURT: Well, I assume counsel feels he has some legitimate purpose; I can't see it.

MR. DAVIS: The same old effort we have had here several times to get into here the trial of somebody else other than the defendants.

MR. MARTIN: We are not trying to try anybody else.

THE COURT: She needn't answer. You may note an exception.

MR. MARTIN: Thank you.

It was on a Tuesday when I came home, and I think it was on the 30th. I came back on the stage, and we got in about 4:30 in the afternoon. I don't think I listened that evening at all, as I was too tired; and I do not remember whether anyone else was listening. The government was not paying the rent of our rooms. Mr. Curtis paid his own rent and the government did not pay anything for the privilege of going there. I didn't ask them for anything. I had no promise of compensation, either directly or indirectly. About 10

o'clock the next morning, which would be February 1st, I went to the door between the office and doctor's office. Doctor seldom got there before 10 o'clock. The first person to come on that day was Etta Goldsbury and she was the only one I saw that day. Patients came to the doctor's office. I saw them in the waiting room quite frequently. Whenever I found there was a patient that had nothing to do with this case I didn't pay any attention. I peeked through and if it was a patient, I quit. I have the time when Mrs. Goldsbury came marked A. M. During the conversation, they talked quite loudly. I heard practically all of her conversation with the doctor. I was looking over the door that day. I looked over the top until I got a good description of the woman, what she looked like and what she had on, and then I moved to the right-hand side, the south side. I heard Mr. Kelley's name mentioned there. I don't remember whether anyone was with me that morning. I have no note of anyone being there. I had never seen Mrs. Goldsbury before. The next time that I saw her was in the Federal Building. She came over here, I think it was the time the Grand Jury, or shortly after the Grand Jury met, and I was in Colonel Davis' room there in the office adjoining. She came in, and I saw her. Mr. Paul Reynolds pointed her out to me as Etta Goldsbury, and I recognized her as the same woman. The next conversation was on February 6th, in the morning, and as I remember it about that time the Doctor was not in his office very much, and there was very few people up there. I frequently listened during those days, but did not

get anything. The Doctor was in the city so far as I know, and I saw him occasionally. My notes are marked 11 o'clock when Mrs. Sorenson came. Nobody else came that day. I have no recollection of anyone being in the office with me that day. I have no note on it. I saw Mrs. Sorenson from over the door. On February 7th I took a new book; my old one was not handy, so I got a new one. First I saw Mr. Sorenson. I haven't it marked down at what time. He and Dr. Goodfriend were alone so far as I saw or heard that day. I saw Mr. Sorenson from over the door; also saw Dr. Goodfriend. Do not know whether they were sitting or standing. The next was February 8th. I don't know the man. He was none of these defendants. It was the time he talked about his wire having been tapped. I think I know who he was, but I don't know positive enough to say. The next I have is on the 11th. On the 9th I saw the Doctor and Kinney on the street in front of Bailey's cafe. That is right there on 10th street, just about a half a block from the Empire Building. I just saw them talking. They were looking up toward my office; that is the reason I noticed them. It was not part of my duty or custom to watch him on the streets. I simply watched the office. I could if I chose, and I chose to. I had no agreement whatever with the prohibition officers about watching the office. I was at liberty to go and do what I pleased. I was not in their employ. I talked with them quite often. Then on the 11th I saw someone go to the doctor's office somewhere between 10 and 11. I saw Mr. Griffith. I also saw Mr. Sorenson that

day. Mr. Griffith came first. He came between 10 and 11. He didn't stay very long. They didn't talk very long. I saw them from looking over the door; not over the transom, but through the crack at the top of the door. There was no transom between doctor's office and mine. It was a crack between the top of the door and the casing. It was where the door sagged a little on the frame. I don't remember what spot that I saw him. He was walking around quite a great deal, and the doctor was also. They were talking in loud tones that morning. I had no trouble in hearing them. I do not think I could have heard them had I been in the hall. Nobody was with me. Mr. Sorenson came at the time Mr. Griffith was there. Mr. Griffith came out and Mr. Sorenson went in. Then Mr. Griffith came back in again. After they talked a bit, Mr. Sorenson and Mr. Griffith left and went out in the hall in front of my private room, and stood there at that door, and stood just north of my private room. Mrs. Sorenson came and talked to them, too, and they had a conversation. She hadn't been in the doctor's office, and they were talking loudly, and didn't seem to care who heard them. I didn't see anyone else that day, as I left and went to church. That was on Sunday. That is the last record I have, the 11th. It was on the 15th; I went over and identified Etta Goldsbury. It was on the 20th sometime about 7 o'clock that I saw Mr. Hill. I saw him afterwards and he was identified to me out there in the hall by Mr. Kuckenbecker on Monday, I think. I wrote in the book about Mr. Hill right after the conversation. The notes start as

follows: "Ed Hill came up." "I came in for the past part of the conversation." I put Hill's name down at that time because somebody told me he was there; that it was Hill—it was Mr. Kuckenbecker. I think I now remember that Mr. Kuckenbecker was there that evening. The reason that I had Mr. Hill identified to me here in Court was that I wanted more proof. (Witness turning to place in note book) in regard to Etta Goldsbury, I wrote on the side of my notes Etta Goldsbury; I made this notation last Sunday morning for my own use. Up to the time that I came over here to the office I didn't know who she was. I never saw Etta Goldsbury there but the one time. I never made a formal report to the government officials. I submitted my book to Mr. McEvers. He is the only one that had my note book that I know of. I gave them to him. He kept them at the office sometimes to look over. I took them over two or three times. Mr. McEvers and I have talked over the notes. I have shown him my notes. He knew what was in them and I let him see them and that was just about all. He looked them over. We remarked on some things naturally. I don't know whether Colonel Davis saw them or not. He probably did. I don't think Colonel Marsters ever did. I never showed them to him.

There is nothing in my notes to show where I stood while looking or listening to any of these conversations. The way that I fixed where I stood these conversations was because before the first of the month I generally always stood over at that other side because that was

my place, over on the north side. In answering the questions where I stood during these conversations, I answer them to what I remember to be my custom. After the first of February the Federal Agents were not there, so I took that side again, the south side I always stood there after the first of February. I could hear better there. I have no children living. My family is just my husband and myself. I never lived in Tacoma. When in Vancouver, I lived in my own house, a house, not an apartment. Part of the time I was in Vancouver—the first time I was there I lived in an apartment, because I couldn't get anything else. Most of the time I lived in a house.

CROSS-EXAMINATION

(By MR. SMEAD)

I do not remember any other occasion that I saw Mr. Smead except the one. I have no record of it. If I saw Mr. Smead on any other occasion, I probably didn't hear him say anything that I thought was important. I don't remember whether I ever saw him in Doctor's office during the months of January or December. I didn't make any record. I did not hear anyone else in Doctor Goodfriend's office in December or January talking on the subject of stills or intoxicating liquor, or any of the allied subjects, except the people that I have told you about here, except the time I heard Doctor talking to Mr. Smead about Ed Kemp's case. I heard Dr. Goodfriend once or twice mention the subject of intoxicating liquor, and the traffic in intoxicating liquor. I never heard him talk with Mr. Boom, a lawyer on the same floor. In looking through

the crack in the side of the door I could look right into the office. The crack was straight up and down. The widest field of vision in looking through the door took in part of both windows. I could see part of both of them.

Q. Mrs. Curtis, didn't you on one occasion in December have a considerable argument that resulted in a quarrel with Dr. Goodfriend in his office?

A. No, I never quarreled with Dr. Goodfriend.

THE COURT: Just a minute, she has answered the question, but it is not a proper question.

MR. SMEAD: Well, does your honor mean the form?

THE COURT: Yes.

MR. SMEAD: Or the subject matter?

THE COURT: The form. The subject matter too now.

Q. (MR. SMEAD): Well, I will ask you if it isn't a fact, Mrs. Curtis, that on a day in December, following the first series—the first of the two series of lectures here given by Mr. Burger, you went to Dr. Goodfriend's office and engaged him on the subject of the Ku Klux Klan—

MR. DAVIS: That is objected to as incompetent and immaterial.

THE COURT: Objection sustained.

MR. SMEAD: I offer this for the purpose of showing motive on the witness' part.

THE COURT: You may ask her directly whether she has any ill will toward any one of the defendants.

MR. SMEAD: I don't care to ask it that way your, honor. I take an exception to the ruling. I think that is all.

CROSS-EXAMINATION
BY MR. HEALY

The first time I saw Mr. Ward in Dr. Goodfriend's office I knew who he was and I knew his name. I saw him along in the summer down on Main Street. I do not remember who first pointed him out to me as Ed Ward. Yes, I knew who it was. I knew it was Ed Ward.

CROSS-EXAMINATION
BY MR. GIBSON

I never saw Mr. Gibson in Dr. Goodfriend's office.

O. I. KUCKENBECKER produced as a witness on behalf of plaintiff, being first duly sworn, testifies as follows:

DIRECT EXAMINATION OF MR. O. E. KUCKENBECKER BY MR. DAVIS

My name is O. E. Kuckenbecker. I am a Federal Prohibition Agent and have occupied said position since last April a year ago. I was holding that position in December of last year. I have been in the room occupied by Mr. Curtis, in the Empire Building. I know where these rooms are located with reference to Dr. Goodfriend's office. The diagram here, as a plat, appears about right. The first time I was in Mr. Curtis' office was on the 29th of December. I heard a conversation in Dr. Goodfriend's office at that time, and I looked over the top of the door into the inner office of Dr. Goodfriend. There were several parties in his

office. The first man I do not know. The second man is Chief of Police Griffith. Dr. Goodfriend had a conversation with the first man. Just as I arrived at the door and looked, I understood the party to tell Dr. Goodfriend that he was not interested in his bribes. I do not know who the man was. I heard the conversation between Dr. Goodfriend and Chief Griffith.

Q. You may tell us what you heard. Just a moment. At that time did you make any notes of what you heard?

A. Yes, sir.

Q. When did you make those notes?

A. Directly after. Possibly four or five minutes after the people had left the doctor's office.

Q. Did you make them there in the Curtis office?

A. Yes, sir.

Q. And those are the notes that you now have with you?

A. Not those notes that I copied at that time. The first time I copied them on an envelope and went directly back into the office, our office, Yates Building, and then copied them in this book.

Q. From the envelope?

A. Yes, sir.

Q. You have that last copy you have referred to there before you now?

A. Yes, sir.

Q. All right. Now, using those notes for the purpose of refreshing your memory, from them, Mr. Kuckenbecker, you may give the substance of the conversa-

tion between Dr. Goodfriend and Chief Griffith as you heard it.

MR. CAVANEY: What time of day is it that this is alleged to have occurred?

A. It was between 1:30 and 3:30.

Q. (MR. CAVANEY): Do your notes show that?

A. Yes, sir.

Q. You wrote that down at the time, didn't you?

A. Yes, sir.

Q. What time—I didn't get the time?

A. The reason—I left the office—

THE COURT: Between 1:30 and 3:30 in the afternoon, you stated?

A. Three-forty is what I have here.

A. THE COURT: Three-forty.

A. Yes, sir.

Q. (MR. CAVANEY): Was all of the notes written between that time?

A. I just made sketches of the conversation on an envelope that I had.

Q. When did you make the sketches?

A. Right after the conversation.

Q. After 3:45?

A. Right after each conversation I made sketches on an envelope. And after I left the Curtis office at 3:40 I went to the office up in the Yates Building and copied them in this book.

Q. (MR. DAVIS): You may now give the conversation that you heard between Dr. Goodfriend and Chief Griffith.

A. When I first looked over the top of the door I

see a man that weighed about 160 pounds, that wore glasses, I judge about—

Q. I am asking you for the conversation between Chief Griffith and Dr. Goodfriend.

MR. CAVANEY: Might I ask a few questions in aid of an objection.

Q. (MR. CAVANEY): Now, can you give this testimony without referring to those notes?

A. No, I cannot.

Q. Can't you remember anything that occurred there without referring to the notes?

MR. DAVIS: We object to that as incompetent and immaterial.

MR. CAVANEY: I want to test his memory if your honor please.

A. This testimony runs over a period from the 29th of December on to the 27th of January.

Q. (MR. CAVANEY): But you can't give anything that occurred there at that time without referring to those notes.

A. I would have to refer to the notes, to be absolutely sure.

Q. You couldn't, from your own independent recollection, give any statement of any conversation that took place at that time and in that place without referring to those notes?

A. No.

Q. (MR. GIBSON): Mr. Kuckenbecker, you took the notes on an envelope, and then went to your office and copied those?

A. Yes, sir.

Q. Didn't you enlarge on those notes and put it into narrative form when you got to the office?

A. What do you mean, large?

Q. Did you write the same words or did you add to it?

A. I added to it, yes.

Q. Yes?

A. Yes, sir.

Q. Where are your original notes?

A. I think they are destroyed.

MR. CAVANEY: Now, if your honor please, in order to save the record in this case, we will make a motion, or we will object to the reading of these notes for the reason and upon the ground that they are not the original notes made at the time conversation occurred; and the testimony shows that they were enlarged upon and changed subsequent to the time that the– and when they were copied in this book, subsequent to the time the conversation took place.

MR. HAWLEY: I would like to add that the original notes were destroyed by the witness.

MR. CAVANEY: Yes.

THE COURT: As I understand, Mr. Kuckenbecker, when you went to your office in the Yates Building immediately after this, with the notes you had made upon these envelopes and with your memory as it was then, you made the entries that you have now.

A. Yes, sir.

THE COURT: The objection is overruled.

MR. CAVANEY: Note an exception.

Chief Griffith entered Dr. Goodfriend's inner office

and the doctor reached up on his desk and took a box of cigars down and he handed the Chief the last cigar in the box, and invited him in—

A. Dr. Goodfriend told the Chief that Hill had been sticking around in front of Jap's place, and he wanted the Chief of Police to keep him away. And he talked about another office, Dr. Goodfriend did. I didn't get his name. And he said—

MR. SMEAD: We object to any testimony about Jap's place here at this time unless the prosecution has something to show that Jap's place comes into this conspiracy charge.

THE COURT: Yes, Mr. Kuckenbecker. I haven't instructed you. I will now. I will instruct you that if you have notes there of any conversation or other incidents that relate to matters that have no connection with this particular phase of the case, do not give those. Omit them.

A. Yes, sir.

THE COURT: I give you that instruction now, and bear it in mind throughout your testimony.

MR. DAVIS: If your honor please, may I make a suggestion there. It is the Government's contention here that the working understanding between Dr. Goodfriend and the Chief of Police was such that this evidence becomes competent to show that understanding.

MR. CAVANEY: Understanding of what?

MR. DAVIS: The agreement in this case.

MR. HEALY: We object to this statement of the district attorney as prejudicial.

MR. SMEAD: If the Court please, there is no

evidence in this case yet that Dr. Goodfriend had any understanding with Chief Griffith. We object to some understanding about other matter that isn't connected with this charge.

THE COURT: Well, gentlemen, I am only trying to protect you against prejudice. Of course, strictly speaking, aside from that consideration, the Government has a right to put in any conversations between the defendants here during this period, if they have any relation to it, whether direct or indirect, remote or otherwise. However, I am going to protect you against any incidents that may prejudice you, even though in itself it may be material to this case. Now, Mr. Reporter—

(The reporter read the witness' last answer to the judge without the hearing of the jury.)

THE COURT: I think this far, this answer is proper, as tending to—It may be argued that it shows an intimate relation between the Chief of Police and Dr. Goodfriend.

MR. CAVANEY: If your honor please, the fact that there might be an intimate relation between them would not indicate that there might be some wrong doing between the parties.

THE COURT: Oh, no, but in a proof of conspiracy it is always proper to show the relations between the parties charged with the conspiracy.

MR. CAVANEY: If that is the only purpose of this question and the answer that would be elicited from this witness, that the Court will so instruct the

jury that that is the understanding, I will be glad to admit it.

THE COURT: Oh, yes, that will be the only purpose, the only purpose for which the jury can consider it, as showing some confidential or intimate relations between the Chief of Police and Dr. Goodfriend. We are not trying any other cases or any other wrong doing, and the jury will not be interested in that.

MR. DAVIS: Simply establishing the conspiracy.

THE COURT: That will be the only purpose, and, Gentlemen of the Jury, it will be the only purpose for which you will consider it.

Q. (MR. DAVIS): Now state, Mr. Kuckenbecker.

MR. SMEAD: We, on the part of the defendant, Goodfriend, note an exception to the ruling of the Court.

The doctor told the chief that this officer was no good and he said "You got to get rid of him". I found out later that was in reference to Mr. Briggs. There was a further conversation that I could not understand and Dr.--the chief told the doctor, "I cannot guarantee anything that my men might do," and he says: "They don't go unless I ask them, or tell them to." The chief wanted to know of the doctor if there were any "stool pigeons" put to work, and the doctor told him that he was in a position to know if there would be any, and he said that Jim Agnew was O. K. He also said that Jim Agnew was after the Whitehouse, and that Gill and George were no good, and that he would freeze them out. Then they talked politics and the doctor said they would run Pete for mayor. Didn't

mention the last name. Said he was a good man, and he advised the chief to stay out of politics. He said that they would fix that up when it came to election. The chief told the doctor that Colonel Marsters had been to see him; that the Scotch Woolen Mills were selling whiskey, and wanted to look them over or look out for them, and the chief advised the doctor not to say anything in respect to this, but he said if Colonel found it out he never would tell him anything again. The chief leaves. The doctor calls 561. He says, "Hello, Jap, this is doctor." He says, "It is O. K. He just left. Come up. I want to get a shave or go away.

Q. (MR. DAVIS): Anything else on that day, Mr. Kuckenbecker?

A. Yes, sir. There was another party came up after the chief left, and they talked about making money.

MR. HAWLEY: Who was that?

A. Another party. I did not know who it was, and they figured that in two years they would go to the World's Fair, and this month they were going to clean up, I didn't get the amount, but next month they would make $3000.00.

MR. SMEAD: I move to strike that testimony, your honor. The witness says he don't know the party.

Q. (MR. DAVIS): Who made that statement about the $3,000.00.

A. Dr. Goodfriend made the statement.

MR. SMEAD: It hasn't any relation to this charge,

unless it is some of the other parties concerned that he was talking to.

THE COURT: Overruled.

MR. SMEAD: Note an exception.

The doctor told this party that he was off of Gill and George. He said that Gill wanted to be boss and thought he was too smart. Said that Agnew was after them, and Colonel Marsters had men out on the road watching them, and they thought Gill's cache was out on the Arrow Rock road. He also said the election cost Jim Agnew $2,400.00 and that Agnew had a note in the bank. There was another party came up. I think this man's name was Jones.

A. Somebody came in. This party, doctor talked to him in regard to Gill and George and told him that he could furnish protection to the Whitehouse as far as cards were concerned.

MR. SMEAD: I move to strike that out, your honor. This hasn't anything to do with any of these parties, anything to do with this case.

THE COURT: Who said this?

A. Dr. Goodfriend.

MR. SMEAD: But not in conversation with anybody concerned in this case, or any matter connected with this alleged conspiracy. It hasn't any possible connection with it.

Q. (MR. MARTIN): You say Dr. Goodfriend said he could furnish protection to the Whitehouse?

A. As far as cards were concerned.

Q. Dr. Goodfriend could furnish protection?

A. Yes, sir.

MR. MARTIN: That has nothing to do with this case, your honor, neither the parties nor the matter charged.

THE COURT: The objection is overruled. Do you know what the Whitehouse is?

A. Yes, sir.

Q. What is it?

A. It is a soft drink and card room.

Q. Here in Boise?

A. Yes, sir.

Q. Where is it?

A. It is on Main Street, and I think it is between—well, it is just in the opposite block, I think between 6th and 7th and 8th.

THE COURT: Very well, you may go on.

MR. SMEAD: Note an exception.

That is all on the 29th. The next day is the 10th of January. I was in the Curtis' office from 6 P. M. to 9:30 P. M. I was listening at the door part of the time and part of the time at the dictaphone. I can tell what part was heard over the dictaphone and what part was heard through the door from memory and this check here. These notations on the notes were put there a day or two after the conversation. These notes on the side were placed there by me when I started checking up the different parties that were going into the office—Sorenson and Kinney. There is nothing in my notes to indicate where the conversation was heard, with the exception of these checks here as I told you before. I have an independent recollection of this time of where I heard these various conversations. I

drew this line through here at noon. This line is put here after the conversation turned up.

Q. You say you drew some lines in your notes at noon?

A. A little further down, yes.

Q. During the noon recess today, did you do that during the noon recess today?

A. Yes, sir.

Q. You left the building and went over to the Empire Building in company with Mrs. Curtis, didn't you?

A. Yes, sir.

Q. And there conferred with her about these notes and her notes?

A. No, sir.

Q. Where were you when you drew those lines?

A. I was in the Marshal's office when I did that.

Q. When was that?

A. Possibly an hour ago.

Q. You didn't do it during the noon recess then?

A. Well, it was right after dinner.

Q. You just stated you put those lines in there during the noon recess. You were in conference with Mrs. Curtis during the noon recess, weren't you?

A. Yes, sir.

Q. Did you have those notes with you then?

A. Yes, sir.

Q. She had her notes?

A. No, sir.

Q. She didn't?

A. No, sir.

Q. Did you show her your notes?

A. I think she left her notes with Colonel Davis.

Q. Did you show her your notes?

A. No, sir.

Q. You talked with her about this case?

A. Yes, sir.

Q. And your evidence?

A. Yes, sir.

Q. And her evidence?

A. Yes, sir.

Q. And what she had testified to?

A. Partly, yes.

Q. MR. SMEAD: I don't know what good the exclusion rule does under these circumstances, your honor. I don't know why it need be invoked, if after the witnesses get through they talk about what they have testified to.

THE COURT: Why are you making the remark now?

MR. SMEAD: I don't think that witness ought to be permitted to testify, your honor, after he has already conferred with Mrs. Curtis about what testimony she has given, under the exclusion rule.

THE COURT: You may proceed.

MR. SMEAD: Note an exception.

I went to the door just as the 'phone rang, and doctor entered the office. He answered the 'phone and said, "Hello, is Carl there?" He said, "I want to see him." The doctor called 467J and asked "Did you say that 561 called me?" And doctor called 26 several times, but didn't seem to get an answer. Carl comes

into doctor's office, and doctor tells Carl to call them up and tell them about it. Carl Sorenson called 925 and talked with a party on other end of line about room 7. Told this party not to let Florence in room 7. He said that everything would be all right now. The next was on January 15. I was at the door. I was there all day. The doctor called 925. This was in the forenoon. He said, "Hello, is Carl there? Everything is all right." Told them to go right on. Jim Agnew comes into the office, that is into doctor's inner office. The doctor asked Agnew who signed the affidavit for the Vernon. He said they would have to find out. He said that Colonel Marsters and he had made arrangements to get search warrants to come through the sheriff's office and when any searches were to be made they were to work together. I saw doctor lay some bills on his desk. He picked out two bills and handed them over to the sheriff. He took a book from his inside coat pocket. He told the sheriff that the mash was set on December 12th, the first run on the 19th, and that by the 19th of the month they should have $1500.00 to the good. Nineteenth of the month the 19th of January, the doctor talked about running Agnew for next election. The next conversation was with George of the Whitehouse. Doctor says, "Hello, George. I have called you twelve times." George tells the doctor that he knows where he lives and he says the telephone is working. George told the doctor, "I understand you said I am not an American citizen, and can run me out of town any time you want to," and I didn't get until further conversation.

The next I heard is, George said, "I will make my own booze and you make yours." Doctor tells George that if he wanted to close his place up, "I will close it up." George told the doctor, "I know what you can do," he says, "When the sheriff searched my house," he says, "I know dam well you have whiskey here." "The sheriff was sore because he didn't find any. They had an argument and doctor told George to cut out the fighting. He said if they didn't they would all get it in the necks. George tells the doctor that he knows the sheriff would tell him when anything was going to happen. He said that he had no use for Agnew; that Agnew had no mind of his own; that he was weak-minded. He said Mrs. Sorenson would do anything for money; that she knew where he kept his whiskey; that he started her up in business, and just as soon as she got a little money it went to her head.

Q. (By MR. GIBSON): Pardon me, Mr. Kuckenbecker. You are reading from your notes, aren't you?

A. Just partly, yes.

Q. Well, you are reading what you are testifying to, you are reading, that is, you are reading all you are testifying to now from your notes, aren't you?

A. Yes, mostly. I—

THE COURT: Just refresh your memory, Mr. Kuckenbecker. Can't you tell us a little more in narrative form just what occurred?

A. Not and be absolutely sure. I would have to look the notes over in order to—

Q. Glance over them so as to get the subject matter and then give us the substance of it, what occurred.

Doctor told George that Gill would have to lay down. He also told him he was king of the bootleggers. Said he was going to Colonel Davis and see him in regard to Colonel Marsters. Doctor told George he wanted to buy the Whitehouse. George said that Jap Spencer had offered him $1200.00. Doctor told George that Jack Smead knows all my business; he is a good man and knows how to handle a jury and how to pick them. Doctor said, "You will find out some of these days that if there is any whiskey made the doctor himself would be making it. Doctor told George that he could not protect the Whitehouse as long as Gill was there; that the sheriff and Colonel Marsters were after Gill. George talked about Mrs. Sorenson; she was no good, would squeal, and was telling everyone that she was being protected. He also said that she knew where he kept his whiskey. Doctor told George that Jim keeps telling me to look out. About 5:30 in the afternoon of the 15th Mrs. Sorenson came into Dr. Goodfriend's office, very excited. Told doctor they had got the still. Didn't know who they got with it, and she was afraid they would get Carl's car. Doctor instructed her to get a taxi or car and try to stop him. That is, stop Mr. Sorenson, and she left. Later on Mr. Kinney came in. He asked the doctor, "What are you going to do now?" The doctor replied that this was a different proposition. He said they would keep right on. They talked about having the bond lowered, and also that they would get this man out the next day. Doctor also told Mr. Kinney when Ed got out he would have them come up to the office and they would talk it all.

That was all for that day. The next day is the 16th. I was at the door. The doctor and Mr. Smead came into the doctor's inner office. They talked about Ed Kemp's case. He was going to have Ensign & Ensign get the bond through a surety company, and Smead thought he could fix up a property bond, and doctor said it would be best for Ed Kemp to plead guilty, because he wouldn't get over three months. Smead says, "If they charge him with possession and manufacture" he figured he could clean him on one count, because they didn't catch him making booze. Smead goes and doctor calls 925. He says, "Hello, Carl. Anything new? Trying to get it." He says, "Run up now. I want to go get a shave," Gill and George come in and talk about organizing the Whitehouse, and they decided to have Jack Smead draw up the papers. Mrs. Sorenson and Carl came in. The other parties left. Carl said that he had information that a taxi driver had tipped them off. Doctor said, "No, that it was the neighbors that did it." Mrs. Sorenson talks about her case. She said she did not see any reason why she couldn't beat it. She said that she had only lived in room 2 a few days. Doctor told Mr. Sorenson that he got his education in the Bowery. He said they couldn't pull the wool over his eyes. He says, "If someone does squeal, they couldn't prove it." Carl said that someone at the Whitehouse knew they were making whiskey, or knew he was making whiskey, and wanted to know how they found out. Mrs. Sorenson said that she paid Hill $75.00 a month while she was at the Union and $30.00 a month while she was at the

Vernon. She said that she asked Hill if it would be O. K. for the girl to come back that he had run out of town. She said that Hill said it would be all right. She said that she had Hill scared to death. Carl called 26 and asked for Kinney. Said that Kinney would be there in ten minutes. Doctor told Carl to go down and see Ed and get him anything he wanted. Later on Ed Kemp comes into doctor's office and they talk about his being in jail. Doctor asked him how he liked it, and also told him that he had better plead guilty. Kemp told the doctor that his name would not be mention in regard to this case, and also the renting of the house. Doctor replied that he had called up Evans and they said they may bring that up. He says, "You tell me that you were looking for a house, and I told you of this one and called up for you." He said, "We got to tell the same story." Doctor told Ed Kemp that he would take care of his wife and Ed had better plead guilty. He says, "Just as soon as you get over this, we will go right on," that he had a place spotted three or four miles from Owyhee, and another place near some flume, I didn't get the name of the flume that they were going to operate on. The next day was the 17th. This was in the morning. Doctor and Smead talked about Ed's case and said they were going to get him off on possession. Doctor said, "The worst thing about it was the dam fools had so much on hand, that I asked them why they did not bury it. He says, whiskey represents a lot of money. There was a party come into the office, I didn't know his name and haven't been able to find out. Doctor tells

him, "Don't you ever worry. I won't quit. I am going to keep right on. This Ku Klux Klan or Colonel Marsters won't stop me. The doctor talks about getting rid of someone by getting him pinched. Doctor said he would have a talk with Griffith about the Klan. He said that Griffith was opposed to the Klan. He said he hates their guts. He said Henry is just as dead against them as we are. He also criticized the papers for publishing that the Klan was helping the officers He said the papers didn't have any more brains than a louse. The other party remarked to the doctor, "We were lucky we were not all there." They talked about a still turning out fifty gallons a day. Doctor remarked that the Klu Klux Klan is doing it all, and would soon die down. This man left, and then the doctor, talking to himself, says, "I tell you, why don't you buy me out. I want to sell." He says that is the way it goes. I am broke. Then Ed Kemp comes in and doctor asks him if he had seen Steunenberg. Told him to try to work him. He also said, "We will go right along and won't quit." Then Ed Kemp leaves. The doctor sorts over some papers and tears up some checks, and seems to be worried. Talking to himself, says, "If they look me up they will get me into trouble." About 12 or 1 that evening Mr. Reynolds and I went to the store room where the janitor keeps the waste paper and garbage and picked out a quite a number of papers and among them were two checks with Dr. Goodfriend's signature; one made payable to Ed Kemp and the other one to Sorenson. (Certain papers marked Plaintiff's Exhibits 27 and 28 identified, admitted in evidence, and read to the jury.) These checks were

torn in two and Mr. Reynolds fastened them together in my presence. The next was the 18th. I was at the door in the Curtis' office. This was in the morning. Carl Sorenson came into the doctor's inner office and the doctor told him that he had been out the night before looking over a place. Said they didn't want to do anything until they had these cases cleaned up; that he was going to look around a little, and then go up on the second bench. Then they talked about getting a $500.00 bond. Doctor said that could make that up in one batch. Said again that they would have to find a place, that they would have to wait until the cases were disposed of. The doctor said there was a fellow out to his house that told him they weren't satisfied that they just got Ed Kemp. They wanted to get Carl and his car. He said he had sent Mrs. Sorenson out to stop his car or they would have gotten it, too. Mr. Kinney comes in and Mr. Sorenson leaves. Doctor tells Kinney that he has been out looking for a place and said that Kinney's place would be all right in the summer time, but that it is no good now. He talked about getting better protection and Kinney replied that Jim was afraid and they decided to drop Jim Agnew, and figured that Kinney could get all the necessary information. I remember the doctor telling Kinney that they would tip Jim once in a while to keep him in good humor. The doctor said that Jim had called up and asked if there was anything he could do, and wanted to know if he should go. Kinney leaves and Carl Sorenson comes in. Doctor said that he was not going to quit, and he would do as much as

he could and wouldn't squeal. He asked Carl to bring up some receipts, or a receipt for the $500.00 bond." Started to figure in this book of his, and said that they had $575.00. "I have to put up a property bond. Talked about 150 gallons, 30 gallons and his share would be $45.00. Sorenson asked what they would do with his wife and said they couldn't put him in jail for possession. The doctor remarked he had got his $25.00 and said, "I figure to tell him to lay off for a month and then start again." Carl leaves and doctor then calls up 925 and asks if they have left yet. In a short while Mr. Sorenson and his wife came to the doctor's office and gave him something. I saw him hand doctor a paper, I don't know what it was. Doctor said he would give this receipt to Jack Smead. Mrs. Sorenson said that she had $4500.00 in the Vernon Hotel; that Hill wouldn't guarantee anything, that she wished she had bought a farm in place of the Vernon, and the doctor told her not to get cold feet. The next was on the 20th. Kinney came in the doctor's inner office about 10:30 in the morning. The doctor told Kinney that Evans had been up to see him that morning. He said that Evans was all right; that they would have a hell of a time getting anything out of him, and talked about Brown and Smith, two deputy sheriffs. Dr. Goodfriend said they were no good. He said that someone was double-crossing them, and they talked about getting rid of Andy Robinson. He tells Kinney to keep his eyes and ears open and see what he could find out, and Kinney remarked that they couldn't do a damn thing with Evans, and later on Carl Sorenson

came into the doctor's office, and the doctor tells Sorenson that Evans had been up that morning and that Evans was all right. Doctor said they weren't satisfied that they only caught Ed. Carl remarked that Tip going out of town for a while until they got started again. Doctor remarked that his Bowery training had served him good purpose. Later Mr. Evans came in and this man goes. Mr. Evans tells the doctor that he had been over to see the Federal Prohibition officers, and had told them that Ed Kemp had rented the place from him, and he had told Ed Kemp that if he was all right he could stay, and if he wasn't he would have to move, that he would check him up as soon as he got back. Evans said that Kemp had also paid him $10.00 per month rent. Mr. Evans told Dr. Goodfriend that he had cashed the check at the Boise City National Bank. The doctor told Mr. Evans that he did not want his name mentioned in this, and he asked Mr. Evans out to lunch, and Mr. Evans said he was stopping with a son-in-law of his and couldn't go. Later on doctor calls 925, and says, "Hello, Carl, you be up this evening at 6:30 or 7:00 o'clock." Hill came up later on in the evening. I didn't hear the conversation. I saw him as he came up the hall, and saw him go into Dr. Goodfriend's office, but did not hear any conversation at the door as we were in the other office. The next date was on the 22d. Mr. Evans came up to Dr. Goodfriend's office and said that Kemp had been out on the ranch the day before, packing up some of his stuff, and that Kemp seemed to be afraid of him. He also told Dr. Goodfriend that he figured that

Millers had squealed on them. Doctor asked Evans what Marsters had to say about him, and Evans remarked that he drew them out and assured them that Dr. Goodfriend didn't have anything to do with the renting of the place, that Kemp had paid up. Another party came in. I didn't know his name, or couldn't find out who he was. Later on Mr. Kinney comes in and they talk about a still that the Federal officers and police officers had gotten south of Boise the night before. The doctor remarked that some man, either Hammon or Hammish, had told him he could have bought a half interest in a still in South Boise, and doctor said he was foolish for not getting the information or location of this still so he could turn it over to the sheriff's office and they get the credit for making the raid. He also said that the still belonged to McLaughlin or McCullough. Kinney talks about his place. Said that someone had an equity in it; that they would have to satisfy, and the way to satisfy him, they would get a hundred chickens and a cow, and the man that they got onto the place would have to be satisfactory and this other party that had the equity in the place. The doctor told Kinney that he had paid Tip and that Tip was a good man, and would like to have him work for him again. The doctor remarked that Tip didn't know that Agnew was in on this, and said in fact didn't know anything about it. Kinney wanted to get started at once, and doctor replied that he had no capital, and said that all of our money is up in bonds, and said they would have to dispose of the Ed Kemp case first. The doctor said he was going

to have Jim Agnew up to his office and have a talk with him that night. He said that Jim Agnew would have to pick up some of the bootleggers. Mrs. Sorenson came in. Said there was hell to pay. Said that Rose was doing a lot of talking. She thought that Rose was trying to get her in bad with the doctor. Doctor told Mrs. Sorenson that he could have Hill fired in fifteen minutes. Said it was tough sledding, said, "Things go this way sometimes." He told Mrs. Sorenson that you people will have to get along. Mrs. Sorenson said that she was sick of it, could hardly make expenses, and the doctor told her then he would see if he couldn't have things fixed up. Next Jack Smead and the doctor talked about organizing an anti-Klan movement. This is about the time that Burger was here. Smead suggested that the doctor call up a number of his friends. They talked about the parade the Klan was going to have. He said it would be a good idea to have four or five hundred men lined up in front of the parade and slow them down. The next was on the 23d. I was at the door. Carl Sorenson comes in. Doctor talks about things costing so much. Said if it kept up it would put them all on the blink. Told Carl that Evans was in yesterday and that he would be O. K. Carl told the doctor that a man would be a damn fool to start the way things are going. He stated that they were fighting, but the women were doing most of it, and the doctor said that he was trying to do what he could to fix things up, and said that they were organizing, and would get all the houses lined up, and they had better do something or the Klan would

Ku-Ku them. The next was on the 24th. I was at the door. It was in the morning. The doctor came in and the doctor had them make a deposit at the Boise City National Bank of $110.00; one of his patients.

A. Dr. Goodfriend had one of his patients deposit $110.00 at the Boise City National Bank. The patient's first name was Joe, and he gave Joe the bank book and he told him to return it the first time he met him.

Q. When was that?

A. That was the 24th.

MR. MARTIN: If the Court please, we move to strike that, the sending of a deposit to the bank by some patient of his.

THE COURT: Unless you promise to connect it up in some way, Mr. District Attorney, we can strike it out.

MR. DAVIS: We can prove that such a deposit was made, by the books of the bank.

MR. SMEAD: There is certainly no evidence of conspiracy in the fact that he had $110.00, your honor.

MR. DAVIS: We will show a lot of other deposits, we are prepared to show a lot of other deposits that the witness heard about and saw that way, and then prove that the deposits were actually made by the bank's records on that day, in corroboration of the witness.

MR. SMEAD: You can't corroborate a witness on material things by corroborating evidence of immaterial things, certainly your honor.

THE COURT: Overruled.

MR. SMEAD: An exception.

MR. DAVIS: Proceed.

A. The 26th. The same patient comes in, and the doctor has him make a deposit of either $140.00 or $45.00.

MR. MARTIN: If your honor please, we move to strike that out as immaterial.

THE COURT: Overruled.

MR. MARTIN: An exception.

This patient tells the doctor that it makes quite a difference with him back at the Whitehouse again. He said the old bunch was drifting back. This patient leaves, and the doctor talks to himself and says that they would realize that it made quite a difference with him back there again. There was a man and a woman came into the doctor's outer office. I see them leave later on, and it was Ed Ward and Mrs. Goldsbury. I could only hear parts of their conversation. They were in the outer office. This is still on January 26. They talked about the sheriff, and this Henry Hammon, 35 gallons, Vernon, and the patient comes into doctor's—another lady comes into the doctor's, and goes into the inner office. She said that everything seems to have stopped, and the doctor replied, "Yes, they are raising too much hell." I don't know who the lady was. I have seen her up there several times. She was one of the doctor's patients, but not one of the defendants. The doctor tells this woman about a lady that he talked to. He said a couple of young fellows had bought some whiskey from her, and they had made an affidavit before Delana, swearing that they had bought this whiskey, and that he had sent this woman

to Jack Smead, and said that they all came to him for help, that is to the doctor for help, that he should have been an attorney. This lady leaves and the doctor goes out into the outer office again, and the doctor tells Mr. Ward and Miss Goldsberry to keep their whiskey in a pitcher, get rid of it easy, told them they had to use their heads and goes on and told them how he had used his head in other cases. He also said that when a bunch of roughnecks are after you, you have got to use your head. I left the door then and looked through the mail slot, and I see Ed Ward and Miss Goldsberry going down the hall in the direction of the elevator. The next was on January 27. It was in the morning. Looking through the mail slot in the door I see Mrs. Sorenson come down the hall into doctor's office. She come out of the doctor's office and went down the hall in the direction of Smead's office, and a little later doctor comes in and then I went to the door and I heard the doctor tell Mrs. Sorenson that he was cleaned. He said that he had all of his money up in bonds, and if they had Ed's bond money, they would get by. Then Mrs. Sorenson talked about some people that had been up there and bought whiskey, and said that Kelly brought them up there, and on account of Kelly bringing them up she thought they would be all right. And she also remarked at that time that the only whiskey they got was what they drank; that they didn't take any evidence away with them. Doctor asked Mrs. Sorenson about her car, and she said she bought the car last spring, and also mentioned the name of the party the car was registered under,

and she then told the doctor that a brother of hers at Eagle had some jewelry. I don't know whether it was a diamond ring or what it was, worth $1500.00, and asked the doctor if they would take that as a security on the bond. Mrs. Sorenson leaves then. Doctor talks to himself again and says the bond was unreasonable. Later Mrs. Sorenson and Jack Smead came in and Mr. Smead steps to the door and asked the doctor if he would go this boy's bond. There was further talk and the doctor said that his property was tied up in such a way that he didn't know whether it would be any good. He told him he had an equity in some ranch for $6,000.00 or $6,600.00, and Smead replied that that would be all right, and Smead talked to the doctor about Kelly and Sam Webb buying whiskey from Mrs. Sorensen. The doctor finally said that he would sign the bond. Mrs. Sorenson said that they were going to try and get the information from Andy Robinson. If they couldn't get the information, they were going higher up. Doctor talks to Mrs. Sorenson regarding the money and other cases, and he also told her that they may not take his bond on account of the shape his property was in, and also told her that it took time and Carl, her husband, would have to stay in jail today, and he would get right out and see if he couldn't rustle the bond. He tried the Curtis' office that day, going to and from his inner office, into the outer office, and into the hall. He tried the door while he was looking through the mail slot, and back into his office. The doctor also told Mrs. Sorenson that she would win her case, and he says, "We will beat them all," and he repeated they will beat them all.

CROSS-EXAMINATION
MR. KUCKENBECKER BY MR. MARTIN:

I had a key to the door of the Curtis' office, and had free access to go in and out at any time I pleased. I was never inside of Dr. Goodfriend's office. The slot in the mail chute was in the Curtis' door where I could look through and see people out in the hall, north. I could see a person's face who was walking in the hall, from through this mail chute. The mail chute was possibly three or four feet from the floor. I heard all of these conversations that I have testified to by listening at the door when I was in the Curtis' office. I usually stood on a chair while listening. My ears would be pretty close to the top of the door. My eyes would be about even with the crack in the top of the door, and I didn't have to stoop to get my eye on the crack. I would usually stand with my eyes at the crack most of the time, that is from the time I would see a new man or new person come into doctor's office, I would take a look and then listen. I could not hear as well with my eye to the crack as when my ear was to the crack. I would also stand sometimes at the south side of the door, at either one of these two positions. I heard no conversations from any other positions other than these two. I saw all that I testified to either from the top of the door or the mail slot. The testimony I gave entirely from my notes, most of it. I prepared these notes immediately after I heard the conversation with the exception of the 29th. During the noon recess I talked with Mrs. Curtis about the case and about the testimony she had given.

MR. MARTIN: If the Court please, I now move to strike out all of the direct testimony of this witness on the grounds that he violated the order of this Court requiring a separation of the witnesses by going over with Mrs. Curtis the testimony which she had given before he came on to testify.

THE COURT: The Court made no such order.

MR. MARTIN: Separation of witnesses?

THE COURT: No, I wasn't asked to make any such order. The only order I made was that witnesses from both sides be excluded from the Court room, that was the extent of the order and the extent of the request.

MR. MARTIN: Very well. We have made the motion, your honor, to strike out the testimony, on the ground he has violated that order.

THE COURT: Motion is denied.

MR. MARTIN: We would like an exception, please.

When I stood on the chair and looked in over the crack at the top of the door I could see practically half of his office, the east half. When I listened at the south side of the door I could hear distinctly the conversation carried on in the ordinary tones that the people used, that is if a man was facing me. There was a lot of conversations I couldn't hear very well when they were talking low. On the 29th of December there was no other persons present at the conversation in Dr. Goodfriend's room except those that I mentioned. Mrs. Curtis and I were at the door. I don't know whether Mrs. Curtis was there all of the time or not. Mrs. Curtis was in their living room. She was

not listening in. I did not go back to the Curtis' room after the 29th of December until the 10th of January. I was there from 6:00 P. M. until about 9:30. Carl Sorenson was in there that day. That was all. That was all I seen or heard that day. Mrs. Curtis and Miss Taylor were in the Curtis's room on the 10th. Mrs. Curtis listened at the door with me. The next time I was at the rooms was on the 15th. I went there in the morning. Jim Agnew, the sheriff, George, Gill and Kinney were all there on that day. There was some patients there. I didn't make a note of them. Agnew came in the morning. Agnew came in and sat down on a chair with his back to the door. They were alone. Mrs. Curtis was in the rooms with me. Kinney came later in the afternoon. I don't just remember just what time. I didn't keep track of the time. I didn't see him then. I saw him that evening. Mrs. Sorenson came on that day. Doctor directed her to go out and get an automobile and go out on the road and stop Carl Sorenson. Mr. Kinney came in after Mrs. Sorenson left. On the 16th of January I saw Jack Smead and the doctor in the doctor's office. I don't remember where they were when they were talking. Their conversation was about securing a bond for somebody, and Dr. Goodfriend suggested getting the bond from Ensign & Ensign. Mr. Sorenson, George, Gill and Mrs. Sorenson also came on the 16th, and Kemp and Kinney also. Mr. and Mrs. Sorenson came in together in the afternoon. Carl Sorenson called up a telephone number and asked for Kinney, then said he would be back in ten minutes. Don't recall what

part of the office Mr. and Mrs. Sorenson were in when they were talking to the doctor. Do not recall whether they were sitting or standing. Mrs. Curtis was with me when the Sorensons had the conversation with the doctor. Miss Taylor was there; she was in the living room a good deal. I could not tell you for sure whether Miss Taylor listened in on any of these conversations at the door at that time. On the 17th of January Jack Smead, Ed Kemp, were all that were there. Smead came first sometime in the morning. I looked over the top of the door and saw him. They were talking first in regard to the Kemp case; later on the Klu Klux Klan. Mrs. Curtis was with me on that day, and was listening too. Later on Kemp came in. I saw him also. I don't remember where he was, but I remember seeing him in the inner office. I think Mrs. Curtis was with me when Kemp was in the inner office. Mrs. Curtis was usually there. It was in the afternoon when I saw Dr. Goodfriend tear these checks in two, Exhibits 27 and 28. The doctor was alone when he did this. He tore up a good many other checks and things at the same time. It was between midnight and one o'clock when we went and looked in the containers and found these. There was a good many other checks to other people. We got all of the checks and took them to the Curtis' office, sorted them over and found these two that were connected with this case, and kept them and put the others back. Paul Reynolds was with me when we sorted these over in the Curtis' office. On the 18th Mrs. Sorenson, Mr. Kinney, Carl Sorenson, Mrs. Sorenson were the only

defendants who came into doctor's office. Mr. Sorenson came first. He left and Mr. Kinney came into doctor's office, and he left and Carl Sorenson came back, and later on Mrs. Sorenson and Carl Sorenson came in together. I saw each of these parties in the room at the time of the visit. I believe Mrs. Curtis was in the Curtis's room with me. There was no one else that I recall. The next was on the 20th, I believe. I heard and saw Mr. Kinney come in. I also saw Carl Sorenson, Mr. Evans and Mr. Hill later on in the evening. Mr. Kinney came in sometime after 10:30. Mr. Sorenson came after Mr. Kinney. I couldn't tell you the time or the hour. I saw Mr. Hill in the hallway. I saw him through the mail slot. I was acquainted with Mr. Hill. Mr. Hill just walked toward the doctor's office, and went in. I saw him go through the doctor's door. I didn't hear any of their conversation. He didn't go into the inner office. Mrs. Curtis came in later, this is after Hill had come in, and I was in the living room here when Mrs. Curtis came in. I do not recall whether Mrs. Curtis came in before Mr. Hill left. I did not see Mr. Hill leave. I was next at the rooms on the 21st. I heard nothing in regard to this case, this particular case at that time. Went again to the rooms on the 22d. Mr. Evans, a man that I could not learn his name, Mr. Kinney, Mrs. Sorenson, and Jack Smead were there on that day. Mr. Smead was there in the afternoon, I believe. I have only given such testimony as I considered as applying to this case. I think Colonel Davis asked me to give that part of it. I saw Mr. Smead while he was there,

over the top of the door. I was standing with my eyes or ears to that crack in the door at the top most of the time. On the 22d, I frequently spend the entire day peeking and listening through the cracks in the door and there were several days that I heard nothing that I considered connected with this case. On the 22d Mrs. Curtis was with me most of the time in the Curtis rooms. I do not recall any other person being there. I heard Mrs. Sorenson tell the doctor about a lady named Rose, and I heard doctor remark that he could have Hill fired in fifteen minutes. I do not recall whether that was the only reference made to Mr. Hill during that conversation. I don't recall anything else at this time. The conversation between Dr. Goodfriend and Jack Smead in reference to securing a bond from Ensign & Ensign, and Smead talked of giving a property bond. I think that was all of the conversation. The conversation that I gave between Mr. Smead and Dr. Goodfriend on the 22d was practically all of the conversation, and I remember nothing more. The mail slot in the Curtis' door was the ordinary mail slot. Would say that it was an inch and a half high and probably five or six inches long; just the ordinary slot that you see in office doors. It had a shutter over it. I would stick a match underneath the shutter so I could see. The shutter opened on the inside. It was open the width of a match, that is the thickness. Occasionally I used a pencil, but a match was large enough. This slot was cut straight through. On January 23, Carl Sorenson was practically the only one, this is of the defendants, that I saw. There was a lady came

in, but she wasn't one of these defendants. Sorenson was in the doctor's inner office. I do not recall where I saw him. I looked over the door, the crack in the top. The patient who on the 24th deposited the $110.00 for Dr. Goodfriend, was called Joe by the doctor. I heard no other name. I saw him through the crack in the top of the door. He had a patch covering one of his eyes. The doctor was doctoring him for his eye. I heard the doctor count out the money, that is how I got the amount. I heard the doctor tell him to go to the Boise City National Bank and on the next day the same man came to the doctor's office again and deposited for him $145.00 or $140.00. I think it was in paper money. I heard the doctor count it out on this occasion, too. The doctor told him to go to the Boise City National Bank, and told him that probably they would begin to know him after while. On the 26th of January I saw Joe in the doctor's office and another man whose name I could not learn. The second man was not a patient. Ed Ward and a woman that I later found out to be Mrs. Goldsbury, I did not know her name at that time. I don't know which one came first. I don't remember. I didn't see them go into the office. I seen them when they left the doctor's office. They were there together. I knew Ed Ward at that time. I didn't know his name, but I found out what his name was. I knew that he drove a taxi for Joe Millich or did last summer. I saw them going down the hall, leaving the office, first. I had heard the conversation that I testified to before that time. Neither one of them came into the inner office. I could hear part of the conversation from

where they were in the outer office. I listened at the south side of the connecting door. I could hear the doctor quite distinctly at times. There was a large part of that conversation that I did not hear. The others did not talk so loud. I learned who Etta Goldsbury was. I think the time that I went with Mr. McCutcheon, the day they were indicted, I went over to their place, the Union Rooms after the indictment. No one pointed her out at that time, but I knew she was the same lady that had been up at the doctor's place with Mr. Ward. The next time I met Mrs. Goldsbury coming from the direction of the Empire Building and Paul Reynolds pointed her out to me. The time of this conversation in Dr. Goodfriend's office they were there for quite a while. There was a patient come in, and the doctor attended to the patient and then he went back into the hall and talked to them again. I don't know whether the door leading from the doctor's outside office into the hall was open or not. I couldn't see that. The door leading from the outside office of Dr. Goodfriend into the hall was usually open, and in the evening high school boys usually studied in there at his big table. Mr. Nickerson was with me on the 26th. Mr. Nickerson is a Prohibition Agent. Mrs. Curtis was not at home that evening. or that day either. That was the time she was in Twin Falls, I think. The last conversation I heard was on the 27th of January. George R. Day of the Department of Justice was there and Agent Nickerson. That was also while Mrs. Curtis was absent at Twin Falls. Mr. Day is attached to the United States District Attorney's office. I think Mr. Day left about two

o'clock. I left some time after that. I think Mr. Nickerson went before I did. We went up there about 7:30 or 8:00 that morning. Dr. Goodfriend usually comes to his office in the morning about 10 o'clock. He has been there at 9:00. I do not remember what time he came that morning. The first conversation I testified about on this day was about 8:00 o'clock. I think it was shortly after 8 o'clock when Mrs. Sorenson came up stairs. The doctor was not there then. She didn't leave the floor. She went back, she left the doctor's office and went back in the direction of Smead's office, and in a short time she returned and about that time the doctor came. Mr. Smead's office is on the same floor and west of the Curtis office. The doctor came earlier than usual that morning. Mr. Smead came back with Mrs. Sorenson. Mrs. Sorenson talked to the doctor a little while and then she left; she came into the doctor's inner office. The conversation between the doctor and Mrs. Sorenson occurred in his office. They talked in the outside office. I could not see them from where I was. I was at the door when she came down the hall, peeking through the mail slot, and I saw her in the hall. I heard part of the conversation between them. I believe I was standing at the south side of the door. The same place where I usually listened when I didn't listen at the top. I could hear part of the conversation. I think I heard as much as half of it. The last few times she had been there—she usually after a raid or after her husband had been arrested she talked loud, and I don't remember, I think she did talk kind of loud this morning. This was in the morning that her husband was arrested on a bench

warrant about eight o'clock that morning, I think. The outer door in the Curtis office into the hall was closed. I imagine that most of the conversation came from through the doctor's office, because when the doctor left his windows open it seemed to form a kind of a vacuum in there, and I could hear very distinctly. She was in the outer office when Mr. Smead came in and Mr. Smead stood in the doorway between the two offices for awhile. I heard Mr. Smead talk about Kelly and Sam Webb having bought whiskey from her after he came in. I think Mr. Smead was standing at the door, the door between Dr. Goodfriend's offices. I could not see him when he was talking about Kelly. I was not peeping; I was listening. Mr. Smead then left the office and then doctor and Mrs. Sorenson continued the conversation. I couldn't say which office they were in. This is the day that Mr. Day and Mr. Nickerson were also there. When I got these conversations from day to day I wrote them down in my book. I usually submitted them to the district attorney's office every night. I did not receive any assistance in compiling these notes. They were entirely my own work. They were compared after we were making out the case report, or the statement that Mr. McEvers has there. I went over one night and checked them with my notes to see, that is I checked my notes with the transcript that Mr. McEvers has. I prepared that also. I read it off to the stenographer. The transcript is of my notes. I heard Mr. Smead on that day, but didn't see him myself in the office. On the 29th of December when Chief Griffith was in the office, I don't remember where he was standing. He was in the inner

office during the conversation. I saw him from over the top of the door.

CROSS-EXAMINATION OF MR. KUCKENBECKER BY MR. HEALY:

On the 26th of January when Ed Ward and Etta Goldsbury were present in the outer office of Dr. Goodfriend, I heard Ward say that all of his friends were in jail. He said that every damn one of them were there. I heard this conversation through the door. Do not recall whether I testified to that on direct examination or not. I don't think this conversation is in my notes. (After examining notes) "Yes, it is here in my notes. Dr. Goodfriend did most of the talking. I think that is about all of Ward's conversation. I couldn't see any of the participants in the conversation. I had seen Ward before, but had never heard his voice. Don't believe I have ever heard his voice since, not until that day he was arrested. I did not see Ward go in, but I saw him when he left with Etta Goldsbury. I don't think there was any other people in the outer room at that time. I am satisfied there wasn't. I don't think I ever heard Mr. Ward say anything else in Dr. Goodfriend's office except that most of his friends were in jail.

CROSS-EXAMINATION—MR.KUCKENBECKER BY MR. SMEAD:

Dr. Goodfriend, on one occasion while I was there, came in and through the Curtis office, and went into his private office through the connecting door. I am sure that he only went through on one occasion, and

he couldn't have gone through without my noticing it.

CROSS-EXAMINATION
BY MR. LANGROISE:

January 10, when doctor came in, the 'phone rings just as doctor enters office. Doctor answered the 'phone and said "Hello, Carl". He said, "Hello, Carl there, I want to see him."

CROSS-EXAMINATION
BY MR. GIBSON:

No, Mr. Kinney was not at Dr. Goodfriend's office on the 16th. There is only one thing that I have in Kinney on the 16th—that is when Carl called 26 and asked for Kinney and turned to the doctor and said that Kinney would be there in ten minutes. He called the jail and said that Kinney would be at the jail in ten minutes. Doctor directed Mr. Sorenson then to go to the jail and get Ed Kemp what he wanted.

PAUL REYNOLDS, recalled as a witness on behalf of plaintiff, having been previously sworn, testified as follows:

DIRECT EXAMINATION
BY MR. McEVERS:

I am a Federal Prohibition Agent, and have visited the Curtis rooms in the Empire Building on the 5th floor, and while there heard conversations through the door. The 8th day of January was the first day that I heard such a conversation. I saw Sylvester Kinney and Dr. Goodfriend. Saw them in Dr. Goodfriend's private office. I saw them through a crack above the

door. At first they were talking about getting Mrs. Kinney a job at the State House. Dr. Goodfriend asked if he knew who was on the committee, and he said it was outsiders, that Mr. Burry was on it, and he asked if the doctor had talked to Jim lately. I made some notes of that conversation at that time. I put them down immediately after coming in the office. I am referring to my notes for the purpose of refreshing my memory. And doctor asked Kinney, or Kinney asked the doctor if he had talked to Jim lately, and doctor said yes, he called him up the other day and told him about the Abbott still.

MR. SMEAD: I would like to ask a question or two about the notes.

Q. (By MR. SMEAD): Mr. Reynolds, you mean to say those notes you have before you are the notes you made—wrote down at the tme you were listening to some conversation?

A. No, I copied them into this book.

Q. (By MR. SMEAD): Did you write down notes while you were listening?

A. Yes.

Q. What did you write on?

A. A piece of paper.

Q. How big?

A. It was a sheet out of a blank tab.

Q. One sheet?

A. Oh, no, it was a tab.

Q. What do you mean? A tablet?

A. Yes, sir.

Q. Just an ordinary letter size tablet?

A. Well, no, it wasn't.

Q. H'm.

A. It wasn't. No, it was a blank tablet that we—the government furnishes us.

Q. And you wrote your notes on that?

A. Yes, sir.

Q. Now, what do you have in the book there?

A. The same thing.

Q. Is the book an exact copy of what you wrote in that tablet as you call it while you were listening?

A. Not exactly, no.

Q. That is, the story in your book there is a story written up in narrative form from the notes you made while you were listening.

A. It isn't a story, no.

Q. How much have you enlarged on your notes?

A. Nothing only what was said there that day.

Q. (By MR. SMEAD): You said it wasn't the same as your notes. Wherein does it differ?

A. I couldn't write as fast as they were talking.

Q. You have written more in that book than you had in your notes?

A. Yes.

Q. What else have you written in that book that you didn't have on your notes?

A. Nothing. Nothing only what was said in the room.

Q. Sir?

A. Just what I have here is what I wrote in the book.

Q. Could you remember what they said and did independently of your notes you made at that time?

A. I think so.

Q. Why did you keep any notes then at all?

A. So I wouldn't forget.

Q. And you could remember what you didn't have time to write, you could remember that?

A. Until I wrote them down, yes.

Q. You are sure about that?

A. Yes.

Q. Could you remember it all without any notes at all?

A. I think so, until I wrote them down.

Q. It wouldn't have been any trouble?

A. I don't believe it would.

Q. You have a pretty good memory, haven't you?

A. Fairly good.

Q. How long was the conversation that you are starting to relate?

A. I can't say.

Q. (By MR. SMEAD): How long did you stand at the door?

MR. DAVIS: Object to that as not proper time for cross-examination.

MR. SMEAD: It is time to find out about these notes before he testified from them, your honor.

THE COURT: You may answer.

A. Just as soon as somebody would leave the office I would sit down and write down what they said.

Q. (By MR. SMEAD): How long did you stand at the door?

A. I was there all morning.

Q. How long did you stand listening at the time of the first conversation you are talking about?

A. Not very long.

Q. About how long?

A. I couldn't say.

Q. What time in the morning was it?

A. Early in the morning.

Q. How long was it before you left the door?

A. I couldn't tell.

Q. Was it a matter of ten or fifteen minutes?

A. Yes.

Q. Maybe longer?

A. Yes.

Q. Maybe half an hour?

A. No, it might have been twenty minutes, fifteen minutes, I should say, yes.

Q. (By MR. SMEAD): You think that you could remember it all so that you could write it all?

A. No, I don't.

Q. You don't claim to have all the conversation?

A. No, I don't think so.

Q. But that book you have in front of you has considerable more in than your notes you took at the time?

A. Yes.

THE COURT: He has answered that two or three times.

MR. SMEAD: We object to the use of it here.

Q. (By MR. SMEAD): What did you do with those original notes?

A. They were destroyed.

Q. Is what you have said about this conversation true of all the conversations on which you claim you have taken notes?

A. Yes.

Q. And what you said about enlarging on those notes in this book is true of all the matters you have in your book, is it?

A. Yes.

Q. And you have treated each conversation that you are about to testify to that you have in mind in the same way?

A. Of any length, yes.

MR. SMEAD: We object to the use of the book.

THE COURT: Let me understand. I will give you a chance to object to it later on. Let me understand.

Q. (By THE COURT): Mr. Reynolds, you say you jotted down some notes of what you heard while you were in the room listening?

A. Yes, sir.

Q. (By THE COURT): How long after you got through listening did you make the entries in this book that you have before you?

A. Well, just as soon as I got through listening I wrote all I could hear upon a piece of paper and then copied it exactly from that piece of paper to this book.

Q. When did you copy this book?

A. When I came back to the office, right afterwards.

Q. The entries in this book were always made within 24 hours after?

A. Oh, yes.

THE COURT: Objection overruled.

MR. SMEAD: I would like to ask another question, your honor.

Q. (By MR. SMEAD): You just stated to the Court after you got done listening to a conversation you would always write it down exactly on a piece of paper?

A. Yes.

Q. You mean to say you would write down the exact conversation?

A. As near as I could recall it.

Q. Was this piece of paper on which you wrote after a conversation all your original notes?

A. No, sir.

Q. Sir?

A. No, sir.

Q. You had some original notes taken at the time?

A. Yes, sir.

Q. And then you enlarged on those notes on a piece of paper?

A. Yes.

Q. (By MR. SMEAD): And then you wrote into this book?

A. I copied them from that piece of paper.

Q. What did you do with that paper?

A. Destroyed that and your original notes?

A. Yes.

MR. SMEAD: We object to the use of this book, not proper to use.

Q. (By THE COURT): Those notes and papers were destroyed at the time you copied this?

A. Yes.

THE COURT: Overruled.

MR. SMEAD: Note an exception.

The doctor told him he had called Mr. Agnew up and told him about the Abbott still a few days before and wanted to tell him about five twenty-one Grove Street, and Kinney said he had already told Jim about that and was going to look after it, and then doctor resumed his conversation with Kinney and they talked about buying a house and they would buy it in a blank name so that no one would know who owned the house; and he said, told Kinney, he was going to take a look at the house tomorrow night. Kinney said they could not get the house they were talking about before the middle of February, and the doctor told him that would be all right, they wouldn't need it before then. He said they ought to be able to get a house and pay $500.00 down. Kinney said, "No, we can get the house for $300.00 down and a small payment each month; we can make the payments about $50.00." Then they started out of the room and Kinney left. And shortly Mrs. Sorenson came in and the doctor said, "Come in, Edith." Mrs. Sorenson was evidently taking some treatments from the doctor, because they talked about Edith's health, and then Edith told the doctor that Stoops and Nichols were up again last night and looked at the register. Doctor said, "Well, let them look at the register." She said, "I met them down at the banister and they asked me if they heard the buzzer." She said, "They can't make me take the buzzer down." Doctor said, "No, they can't make you

take the buzzer down; keep the buzzer there." He said, "Where do you keep the whiskey?" and she said, "Some in my room in the chamber, and some in room 207." She said that Mr. Hill was still pestering her, and told her to stay away from Dr. Goodfriend or he would get her in jail, and so Dr. Goodfriend said, "I told Smead to call Hill up and tell him to keep quiet or move on." Then when she started to leave, Dr. Goodfriend said, "Tell Carl to come up, I have to see him. I want to go away." And doctor called 471 on the 'phone and asked for Donald and said he wanted to speak to him in regard to Mrs. Kinney, said he would like to have his wife get that job, and then a voice on the 'phone said "Democrat", and he said, "No, Republican, you know she is the deputy sheriff's wife."

Sorenson came in and talked about—said that Briggs was raising hell with Griffith, and then that's about all they talked about. Doctor said he wanted to see him tomorrow night to look at a place. He said, "All right", he would be up.

On the 20th some lady that I don't know was in Dr. Goodfriend's office. I have not identified her since. I was at the door looking up over the side of the door, and this lady was in the inner office.

Q. Did that conversation pertain to this case?

A. Yes.

MR. SMEAD: I object to counsel's leading questions, and style of leading this witness. Let him tell what he saw and heard. This is the third or fourth leading question he has asked in succession.

Q. (By MR. McEVERS): All right, go ahead and read it then, Mr. Reynolds.

MR. SMEAD: I object to him reading it, your honor.

A. The doctor told the lady he wouldn't put it past Miller to have tipped off the little still. She asked him if he was aboveboard or below board. He said he was a little ahead yet. She said, "Why don't you let well enough alone?"

He got a book and showed her his accounts. She asked if it was his checking account. He said no, it was his savings account. He put the book back in his pocket and asked her if she knew about his fight with officers. She said no. He said he was having a fight with Dr. Almond, the state doctor, about the quarantine law.

I listened at the door on January 30, and about 9:50 Mr. Smead came into the doctor's office. The doctor was not in. He came to the outer office; and I went over to the mail slot and looked through when he tried to get through, but the doctor was not in. Shortly doctor came in and called 925 on the 'phone and asked if Carl was there. He said, "I want to talk to you about the abatement," but he said, "I will see you some other time. It will all come out in the wash. It won't last long." "All right, don't close up." That is all for that date. I was not there at the door at any other time after this. I saw government's exhibits 27 and 28 the first time in an ash can on the 5th floor of the Empire Building. It was the night of the 17th of January. I put my initials on them at that time. Oscar Kucken-

becker was with me when I got these out of the ash can. I stuck them together. I was up at the Curtis rooms at the Empire Building at times other than I have testified to here, and on these occasions I looked through the crack in the door, and on the 4th day of January I saw Sheriff Agnew go up there. I didn't see him in the doctor's inner office. I was looking through the mail slot and saw him go into the outer office. On the 8th day of January I saw Kinney in there. I was looking through the door. Kinney was in the doctor's inner office. On the 5th day of January and 8th day of January I saw Edith Sorenson in there. I was looking through the door, and on the 8th day of January, and the 19th day of January I saw Carl Sorenson there. On all of these occasions the doctor was in his office except this time on the 4th when Mr. Agnew went in the outer office. On the 30th day I saw Mr. Smead in there.

CROSS-EXAMINATION OF PAUL REYNOLDS BY MR. SMEAD:

On January 8, Dr. Goodfriend talked to Mr. Kinney about the Abbott still. He didn't mention any other still at that time. He said something about he wanted to tell him about 521 Grove Street, and he and Mr. Kinney talked about buying a house and paying a small amount per month. On the 8th of January Mrs. Sorenson came into the doctor's office, and she stated in reply to a question by the doctor that she kept some particular room 207. They were talking about the Vernon Hotel. No one mentioned the Vernon Hotel, but she was proprietor of the Vernon Hotel, and I

assumed that it was the place where her room was; but no one mentioned the Vernon on this occasion. Mrs. Sorenson talked about her health at some length on this occasion. I saw Mrs. Sorenson, and she seemed to be pretty well worked up into a state of mental excitement, because of the way she talked and acted.

Q. (MR. SMEAD): Now, Mr. Reynolds, have you had anything that you took to be information concerning any whiskey at the Vernon Hotel prior to hearing that conversation you have told about?

MR. McEVERS: Object, as incompetent, irrelevant.

MR. SMEAD: It is only preliminary.

MR. DAVIS: Not proper cross-examination.

THE COURT: Sustained.

MR. SMEAD: Note an exception.

Q. (MR. SMEAD): Was the subsequent search at the Vernon Hotel based upon the conversation you say you heard there at Goodfriend's office?

MR. McEVERS: Objected to on the ground it is immaterial.

MR. SMEAD: It is very material, your honor.

THE COURT: How is it cross-examination?

MR. SMEAD: Because it is related to the subject matter of the examination, your honor.

THE COURT: Sustained.

MR. SMEAD: Note exception.

I made an affidavit for the purpose of securing a search warrant for the Vernon Hotel a couple of days after this conversation. I stated in that affidavit my information concerning the Vernon Hotel upon which

I asked for the search warrant, and the affidavit so far as I know is still in the possession of the United States Commissioner, John Jackson. That is the only affidavit that was made in order to procure this search warrant.

MR. SMEAD: I am going to ask the witness the question again, your honor, for the sake of the record here, to preserve our rights when the defense's case opens.

Q. (MR. SMEAD): Did you have any other information to rely upon in obtaining that search warrant in making search than what you claim to have gotten through the conversation you overheard in Dr. Goodfriend's office?

MR. DAVIS: Objected to, incompetent, irrelevant, immaterial

THE COURT: Sustained.

MR. SMEAD: Note an exception.

MR. SMEAD: So that there will be no misunderstanding, your honor, I will say I have no disposition in this matter to inquire into where he got his information or who informed him, but I just want to know the fact whether he claimed to have any other than this. It will become very material in the defense's case in chief.

There was a lady in Dr. Goodfriend's office on January 20. I did not look in and see who she was, and I don't know who she was. I have seen her since, but I don't know who she was. The doctor showed her a book that he said was a savings account. On January 30, at 9:50, Mr. Smead came to Dr. Goodfriend's

office and tried the office door, and it was locked. That was the outside door, the door into the hall. I was in Mr. Curtis' office, peeking through the letter slot. I could see that Mr. Smead couldn't open the door. I saw Mr. Smead trying the door, push it back and forth, and it wouldn't open. Then he left it and went back to his office. I could see the door through this mail slot, and I saw Mr. Smead push it back and forth and it wouldn't open. Mr. Smead just worked the knob. On the 4th day of January Mr. Agnew the sheriff, came to Dr. Goodfriend's office. The doctor was there. I heard his voice, but didn't see him. I was looking through the letter slot and saw Mr. Agnew go into the doctor's outer office, but didn't see Mr. Agnew in the inner office. I was in Mr. Curtis' office. I didn't hear Mr. Agnew's voice; I just heard Dr. Goodfriend's voice. I didn't hear any conversation at that time. As soon as I saw Mr. Agnew go in, I went into the inner office. On January 8 I didn't hear any conversation between Dr. Goodfriend and Mrs. Sorenson with regard to whiskey, liquor, or anything like that, more than I have related. No more conversation than I have related. I think I heard all the conversation that occurred at that time. I took my notes on that occasion. I think I wrote all the conversation down. When they talked about the buzzer, he asked her where she kept her whiskey. I do not know that I remember all the conversation. There might have been something in there that I didn't hear. I think that I remember everything until I got to the office and wrote it down in that book, all that was material. When I made these notes in the Curtis'

office I wrote out in full the conversation as near as I could. I think I wrote everything. I couldn't say it was the same words, but it was about the same thing. I wrote down what I remembered, and what I heard, and was all that I did hear.

CROSS-EXAMINATION
BY MR. GIBSON:

I heard Mr. Kinney and Dr. Goodfriend talking about getting Mrs. Kinney a job in the State House on the 8th. At the same time I heard them talking about a house. That house was on the Meridian road. They didn't say how far down the Meridian road it was. They said, "We will buy a house and pay $500.00 down," and Kinney said, "We don't need to do that, we will pay $300.00 down." I didn't hear the word mortgage mentioned at that time. They said something about paying $50.00 a month. They weren't talking about paying a mortgage off at the rate of $50.00 a month. They weren't talking about a mortgage. I don't think that they could have said it, and I couldn't hear.

O. K. NICKERSON, recalled as a witness by the government, having been previously sworn, testified further as follows:

DIRECT EXAMINATION
BY MR. McEVERS:

I visited the Curtis' rooms located on the 5th floor of the Empire Building in Boise, during the month of January, 1923. I went up there the first time on January 23. I heard a conversation in Dr. Goodfriend's

office at that time. I was at the door of Mr. Curtis' office, and the parties who were having the conversation were in Dr. Goodfriend's private office. I was at the top, listening at the top of the door. I made notes concerning the conversation that I heard. I made these notes during the day that I was there. I wrote them down immediately as I heard them. I have got those notes with me. I could see into Dr. Goodfriend's office there on that first day. I took these notes down in long hand, and they were made during the time I heard the conversation. The first time Carl Sorenson was inside the office of Dr. Goodfriend. After Carl Sorenson came they had some little conversation that I didn't catch. Then the doctor said, "They have me all tied up." He said that they have all this money on bonds, and there was some other conversation, and he said, "I wish they would reduce the bonds so I could get some money." This was on the 23d. Then Carl said, "It looks kind of foolish to start things now." The doctor said, "You will never get any place by talking." He says, "This thing will come out all right." He says, "We are going to organize." He says, "We will have an organization." And there was some more conversation that I didn't catch. That was in the forenoon. In the afternoon, when the doctor came back, he called up 777, and he says, "Is Jack home?" I couldn't hear, of course, what was said, and he said, "Come on down." And that is all the conversation for some little time. And then some patients came in and the doctor said, "Did you hear the conversation? Did you hear the talk last night?" And I couldn't hear what was said then. And he says, "Well, never

mind." He says, "We will fix them, we fix them," and he pointed to his mouth and said, "But we must be quiet." He said, "I am not scared of them." He said, "I am not afraid." That was all that was said on the 23d. I visited the same place again on the 26th of January. Mr. Kuckenbecker was with me. I heard a conversation that day. I was standing on a chair looking over the top of the door. I could see in. It was about 10 o'clock. There was several patients come in that I didn't know on that day at this time. There was only Ed Ward that I knew, and Mrs. Goldsbury, Etta Goldsbury, came in later on in the afternoon. I heard part of the conversation with them. They talked for some little time, that I didn't get very much of the conversation, only just before they were leaving the doctor said, "For God's sake, be careful." That was all that I got on that day, that is in the afternoon. On the 26th there was somebody called up on the 'phone and the doctor answered the 'phone and he said, "Hello, is is this Edith?" And I didn't hear, and then after that he says, "All right". That is the only telephone conversation on that day that I heard. I was up there again on the 27th and Agent Kuckenbecker and Mr. Day were with me. I looked through the door on that day. I saw Mrs. Sorenson come in in the morning. Dr. Goodfriend was there when she came. First they had some little conversation and the first thing I heard was Mrs. Sorenson say, "$1000.00 bonds". She said, "They came down the first thing this morning", and then there was some more talk and she said, "$1000.00 bonds", and said that they had the bonds all set when they came down. And there was

some other talk and then she said, "I will see Andy Robinson and find out", and there was some other conversation that I didn't get, and she says, "I got a man higher up", and the doctor said to her, "Well, find out what it is all about". He said, "This thousand dollar bond proposition is a fierce proposition", and there was some other conversation, and she said, "That is in my name". She said, "The car is in my name, and I bought a car last spring." She said, "The car is in my name and the place is in my name." Then there was other talk, and she said, "I don't know what it is for, but it is for possession and something else." And she said, "They took my keys and I haven't any place to go." And then there was a patient came in, and the doctor talked to the patient and then he said, "Thousand dollar bonds", and then there was some other conversation and he says, "It is a funny proposition." He says, "They have got the property and everything", and he says, "You have to work like hell to get money." He said, "This is a hell of a country", and then the patient left. The patient stepped out and a short time after that Mr. Smead came in and they had some little conversation and the doctor said, "Those thousand dollar bonds." He says, "They have her for possession and a nuisance", and there was some other conversation, and he says, "Yes, I will sign the bond", and then there was some little talk and Mr. Smead stepped out and the doctor spoke to someone in the other room and he said, "It never rains but it pours". Then there was some lady came in and talked with him for a little while, and she said, "I wonder if I can go down to the Vernon", and before that though she said—the doctor

said, "Why did you say anything about it?" and then there was some other conversation and he said, "I wonder if I can go down to the Vernon", and then she says, "Why, I guess that will be all right." After she went out there was a patient came in, a fellow that the doctor had been treating with a bad eye, and he told him, "I want you to go over to the bank for me again." He says, "You will be in my employ from now on." And then the 'phone rang and the doctor said, "Hello, all right, and where will you be?" and he says, "Well, I want you to come up here", and here", and he says, "We will make arrangements next week." That was all that I heard on that day. I did not see any money transactions there. I was not up any after that.

CROSS-EXAMINATION
BY MR. HEALY:

I stood on the top of a chair on each of these occasions. I took the notes on a little scratch pad, a folding tablet, and then I came over to the office and copied them off. I copied them directly from the scratch pad onto the paper that I have here. I just held this scratch pad in my hand while I was standing on the top of a chair, and I would be listening through the crack and writing at the same time. I couldn't, of course, begin to keep up with any sort of a rapid conversation. There was a considerable amount of conversation back and forth that I couldn't catch it up to make sense. All I got was fragments and snatches of the conversation. My hearing is pretty good. It is perfectly normal so far as I know. I was watching close to the

crack most of the time and didn't have my ear up close to the crack most of the time, and didn't have my ear up close to the door and only got what came through over the door. After the people were in the office and the conversation was in progress, I then had my ear to the door. All that I was able to get was an occasional sentence or part of a sentence, and when they were talking low I couldn't get it. Dr. Goodfriend was talking in each one of these conversations and the occasional sentence of the doctor which I have reported is all that I heard him say that had any relation to the case. I just put down what I could hear, and what I was sure of. When I first went up there I knew partially what the case was about. I was instructed to obtain evidence on this case, and I was given a general outline of what the case was supposed to be. I picked up everything except what he said to his patients and such as that, and even what he said to his patients if I thought it applied to the case; I put it down, too, then. And no matter who the statement was made to and under what circumstances, I took it down if I thought it applied to this particular case, and I would in that way take sentences away from their context, the balance of which I didn't understand and put it down. I did that all the way through my notes. I have no interest in this case one way or the other. I am trying to tell the thing just exactly as I heard it. I, of course, was looking for evidence against these parties, and was looking for evidence that would connect them up with the case that I was working on, and would fit in with the theory of the case that was supposed to be against these parties.

ELIAS MARSTERS, produced as a witness on behalf of plaintiff, being first duly sworn, testified as follows:

DIRECT EXAMINATION
BY MR. McEVERS:

I am Federal Prohibition Director of the State of Idaho. I have held that position since a year ago the 23d day of last July, and as Federal Prohibition Director I have charge of all the agents of this state. Sometime in December I had a conversation with Chief Henry Griffith concerning the Scotch Woolen Mills. I don't just remember what date it was. The conversation was sometime in the latter part of December. I think I went over to the City Hall and I saw Mr. Griffith and a Mr. Hill, and I informed them that I had been informed that there was a gallon of whiskey went into the Scotch Woolen Mills the night before, and I said, "We are very busy and wish you would go down and get it", and they said, "All right, we will do it". I visited the Curtis' rooms in the Empire Building on the 5th floor. I think it was on the 30th of January, if I remember right. Paul Reynolds was with me. I looked through the crack in the door between Curtis' offices and Dr. Goodfriends' office. I saw Dr. Goodfriend two or three times. I saw Mr. and Mrs. Sorenson both come up and get off the elevator and walk straight through to where I was standing looking through that little wicker they have in the door, and they turned to the right and they went down as if they were going down west. Of course, I presumed where they were going, but I didn't

know. I saw them come back. Then they went right to the elevator and went down the elevator and went down on the street.

CROSS-EXAMINATION
BY MR. CAVANEY:

I think it was along the later part of December, after the 15th that I went over to the City Hall and notified the police that there was a bottle of whiskey. I don't just remember when it was, but anyway they went down and got the Scotch Woolen Mills that night. I couldn't say whether it was the day before Christmas; I didn't take any account of it. I couldn't say whether it was the day before New Year's. I don't remember only that they went down that day and got it. If you can get the date when they went down and got it, that is the day, because it was that afternoon that I saw them.

CROSS-EXAMINATION
BY MR. SMEAD:

I believe it was on the 30th of January that I saw Mr. and Mrs. Sorenson come into the Empire Building. I can tell by looking at these notes. I wrote these notes down at the time. It was on January 30. I was there in the morning about seven o'clock. I know I got there before daylight. I saw Mr. and Mrs. Sorenson come in along about ten or eleven in the morning. I should say they were in the building about a half or three-quarters of an hour. I didn't keep any particular time. The chief of police never at any time refused to cooperate with me in the enforcement of the liquor law.

RE-DIRECT EXAMINATION
BY MR. McEVERS:

I never took any of them on a raid of the Vernon Hotel or the Union Rooms. After Mr. and Mrs. Sorenson came from the direction that I saw them come from, Dr. Goodfriend came in that direction, following them.

RE-CROSS-EXAMINATION
BY MR. SMEAD:

About five or ten minutes after the Sorensons left the building I saw Mr. Smead walk in the building. A short time later Dr. Goodfriend come up the hall and Mr. Smead came along and they both went into Dr. Goodfriend's office. They talked in there. I couldn't catch very much that was said. Doc seemed to be quite excited and doing a great deal of swearing. I heard very little of the conversation. I was at the door; the door between Mr. Curtis' office and Dr. Goodfriend's inner office. I was sitting on the end of the cot. I didn't hear very much because at that time you didn't until after you went out. Doctor Goodfriend or you neither one come into the inner office. You were both in the other offices. There was nobody else in the other office at that time. I know A. C. Boom. I know his voice when I hear it, and I heard him there, too. I don't think he was in there at the same time; no, he wasn't in there when you was in there; I am sure of that, but he was in there right after dinner. I wasn't watching from the halls to see, but I am quite sure he wasn't in there when you and

doctor was there. Mr. Boom was my predecessor in office.

A. C. MOUSER, produced as a witness on behalf of plaintiff, being first duly sworn, testified as follows:

DIRECT EXAMINATION
BY MR. McEVERS:

My name is A. C. Mouser. I live at Boise, and I am in the taxi business. I made a trip to the Whitney School. I did not know at that time the lady's name that I took. I have seen the lady around the court house since. I can't call the name right now. It was along the fore part of January, but couldn't swear to the date that she came to my stand at the Owyhee Hotel.

GEORGE A. DAY was produced as a witness on behalf of the plaintiff, and being sworn, testified as follows on direct examination:

My name is George A. Day. I am living at Boise at the present time. I am a special agent in charge of this district of the Department of Justice of the United States. I have been engaged in this business since June, 1922. On January 27, 1923, I visited the Curtis rooms located on the fifth floor of the Empire Building in Boise, Idaho. Mr. Kuchenbecker and Mr. Nickerson were with me at that time.

At that time I heard a conversation in Dr. Goodfriend's office. I arrived at the Curtis office about eight A. M. About 8:50 A. M. Dr. Goodfriend arrived at his office. Soon afterward a lady came to his office and he says: "Good morning, Mrs. Sorenson", and she said "Good morning", and he said, "They arrested

Carl this morning?" and she said, "Yes". He asked her what time this took place, and she says "About 8:00 A. M." Then the doctor says, "I wonder how all this happened", and she said she didn't know, but Mr. Kelly brought a man up to her place that looked something like a Jew, but she believed he would be all right, as Mr. Kelley would not bring anybody up there but what was all right.

Dr. Goodfriend said, "We will have to rustle bonds", and he said that he couldn't put it up; that he had gone on several bonds and he would get himself into trouble if he continued to sign bonds. He said his box was empty. He said he would have to go outside and see if he could raise it. That was about all that was said.

At another time that day Mr. Smead came to Dr. Goodfriend's office and also discussed the bond with Dr. Goodfriend. There was also one other party, I don't know who it was, came in to be treated by the doctor, and the doctor said to him that Sorenson had been arrested and his bond had been placed at a thousand dollars and he thought it ought to be reduced and he was going to try and get it reduced and that the Government didn't think any more of a thousand dollars than they did of fifteen cents.

ON CROSS-EXAMINATION THE WITNESS, DAY, TESTIFIED AS FOLLOWS:

I didn't know the party who came in to be treated by the doctor. I heard some of the conversation between Mr. Smead and Dr. Goodfriend about bonds.

I heard very much of it. The doctor didn't say to Mr. Smead that he didn't want to go on Carl's bond. He didn't use the word "unpleasantness" in connection with his objection to going on the bond. He said he had an equity in a piece of property of $6500.00. I don't remember him saying that his wife wouldn't like it if the fact that his going on bonds were published in the papers and she saw it. He didn't want to go on the bond on account of his wife having an equity. He said he would rather not go on the bond on account of his wife.

ON RE-DIRECT EXAMINATION THE WITNESS TESTIFED:

I stated that the doctor said he didn't want to go on the bond on account of the fact that his wife had an equity in the property.

ON RE-CROSS EXAMINATION, THE WITNESS TESTIFIED AS FOLLOWS:

When I heard the conversation between the doctor and Mrs. Sorenson, I was listening on the south side of the door. I saw Dr. Goodfriend quite often and I saw Mrs. Sorenson as she went away. There was a mail hole or something in the door, but it could be opened up and I saw her walk out. I looked through the crack in the door, but not on this particular occasion. It was afterwards. When the parties came in I was not looking through the door.

ON RE-DIRECT EXAMINATION THE WITNESS TESTIFIED AS FOLLOWS:

By looking direct through the crack in the door between the Curtis and Goodfriend offices you could see written on the window the double O and part of a third letter, but when you would cast your eye on an angle, I should judge you would take in 25 degrees of the room. That would be on the far side of the room. Your vision would naturally expand as the angle at which you would look.

ON RE-CROSS EXAMINATION THE WITNESS TESTIFIED AS FOLLOWS:

If I remember correctly, the sign "Goodfriend" is on the south window, on the east side of Dr. Goodfriend's private office. I am quite positive that you can see part of the north window, and you can see all of the south window, I am quite sure. That is through the crack at the north side of the door and over the transom, but I didn't look over the transom. I am quite sure that you could see part of the window further north. I distinctly noticed that you could see by looking just straight through without casting your eye at any angle, you could see both letters "O", and part of the "D" on the window further south. There was a transom over the door but I didn't look through it.

PAUL REYNOLDS, a witness heretofore sworn, testified on behalf of plaintiff as follows:

I had a conference with J. H. Evans in the Yates Building on January 20th.

Q. Will you just relate what the conversation was?

MR. HEALY: Objected to as hearsay and incompetent.

THE COURT: Read the question.

MR. SMEAD: And for the further reason that Mr. Evans himself has been called as a witness for the prosecution, and has testified to these facts.

MR. McEVERS: I may indicate the purpose before the Court rules.

THE COURT: Let me have the question.

MR. McEVERS: The theory, if the Court please, is this: It is always material to show that a defendant has fabricated a defense. In this instance, it is already testified to here and shown that Evans was the constituted agent of Dr. Goodfriend to go to the Federal prohibition office, and there fabricate defense, and cover up. And I want to show that Dr. Goodfriend did go over there and fabricate this defense.

MR. SMEAD: I take exception to counsel's remarks, as unwarranted and prejudicial, on behalf of Dr. Goodfriend. There isn't a word of any such thing in the record, and Mr. Evans testified as a witness for the prosecution and has told all about that. Why should somebody else be called to—

THE COURT: Objection sustained.

ADA E. TAYLOR was sworn as a witness on behalf of plaintiff and testified as follows:

My name is Ada E. Taylor. I live at 2411 Woodlawn Avenue, Boise. I am a stenographer for the Federal Prohibition Director for the State of Idaho. My office is in the Yates building. I have been employed in that capacity a little over two years. I have

visited the Curtis apartment and office in the Empire Building during the month of January, 1923. I heard conversations through the door between the Curtis and Goodfriend inner office. The first date I heard conversations was January 10th. I have been educated in short hand. I use the Gregg system. The extent of my experience is that I have worked about four years. I attended a school of shorthand and completed the course. I attended Links Business College, and have taken and passed the Civil Service examination in shorthand. I am able to take down an ordinary conversation in short hand when I can hear it. The first day I was at the door in the Curtis rooms and took down shorthand notes of the conversation, I heard, I have those notes. I looked over the door once to see who was in the inner Goodfriend office at that time. I looked through the door once. I saw Dr. Goodfriend and another man. I don't know positively who the other man was. This was a conversation I heard through the door.

MR. HAWLEY: We object on the part of defendant Agnew to this conversation being related.

THE COURT: Unless the other man is identified, it will only be considered as bearing upon the guilt or innocence of defendant Goodfriend.

THE WITNESS: I heard a man's voice. This was about 7 o'clock in the evening of January 10th. I heard a man's voice call 26, the sheriff's office. I took these notes at the time. I have them here. They are the notes of all the conversation I heard. I have

transcribed the notes but these are the original notes. He called 26.

MR. GIBSON: That can't be what she heard. "He called 26."

THE COURT: Why not?

MR. GIBSON: That isn't the conversation. She didn't hear in that office these words, "He called 26". I understand she must now testify from these notes, but she is attempting to read what she heard.

THE COURT: If that is what you want, I suppose counsel for the government is very glad to comply with your suggestion.

MR. GIBSON: I understood that was his suggestion.

THE COURT: I assumed you would object to that. You may read—

MR. GIBSON: I am not consenting that she read them, but she is purporting to read those notes, and if the district attorney wishes her to read those notes, she should read them, and not say some other remarks.

THE COURT: What would you prefer, Mr. Gibson?

MR. GIBSON: I am not proving the district attorney's case, and I want to know whether he wants her to testify by refreshing her memory.

THE COURT: He suggested that she refresh her memory and testify.

MR. McEVERS: Now, refreshing your memory from your notes, testify as to what you heard and observed.

THE WITNESS: This man's voice called 26, the

Sheriff's office, and he called four times. He said, "Is he in there now?" Then I looked through the crack in the door and I saw Dr. Goodfriend, and his back was toward me and he was handing a young, smooth-faced man some bills and I could see the bills but I don't know how many there were. This man, I think, was Carl Sorenson. I don't see him in the court room at this time.

MR. LANGROISE: At this time I move that the testimony be stricken out as to who she thought it was, and any reference to it.

A. And he handed this man some bills.

MR. SMEAD: I move to strike that out, your honor, that he handed some bills. She says that she don't recognize any defendant in this connection. Certainly the fact that Dr. Goodfriend gave some man some money wouldn't have anything to do with this case.

THE COURT: It won't hurt you, then, if it isn't connected up. Proceed.

THE WITNESS: Dr. Goodfriend said, "this search warrant, Jim, no right of course. These fellows are framing all the time. These fellows double crossing us. Well, I will see you. Room 230, room 207.

THE COURT: This was all on the telephone, or just conversation?

A. This is the conversation. "Room occupied by you. Room 207. Of course there is no room in the search warrant all right. No, I don't think they will do anything. Whether that is a room or not. Go into that room, in a room where a man—into a man's room

when he isn't there. I don't think bonds. Different proposition. Marsters. You fellows misunderstood it. Room 207. Who issued this warrant? Somebody has doublecrossed us."

MR. SMEAD: Now, if the Court please, this witness, it is very obvious, is reading from some notes she claims to have there, and what she is reading doesn't make sense. It isn't stating anything. I submit that if she didn't hear enough of this conversation to give its substance she should not be permitted to testify at all. It is just a fragment, a word here and there, that she is translating off of what she claims to be shorthand notes, and she isn't saying anything.

THE COURT: Overruled.

THE WITNESS (continuing): "I think I know who it was, too." That was in another man's voice. The doctor, "I think I know, too. It was Ed."

MR. SMEAD: I object again to the witness reading her notes. That certainly is beyond the bounds. If she can give the substance of it by refreshing her memory, of course, she has a right to testify, but I take exception to her reading the notes as she is. It is evident that she is reading from some notes there.

THE COURT: It is customary to permit stenographers to do that.

MR. SMEAD: Well, if they can give everything that occurred, there is no objection.

THE COURT: Presumably she is giving what she heard. You are giving all that you were able to take down under the circumstances.

A. Yes, sir.

Q. Heard and took down?

A. Yes, sir.

MR. SMEAD: I take exception.

THE COURT: Yes.

THE WITNESS: He calls 167-J, Dr. Goodfriend's voice. That is on the 'phone. 167-J. "Hello. Come down. I can't help it. I couldn't help it. I will try." This is the telephone conversation. The doctor speaking to someone in the office: "Now, I am ready. That will be all right under the state law, but they can't get by under the Federal. They tried to get him. Military examination." About this time another man came into the office and said, "They have it for searching 202." I didn't know at that time who this man was. I know now it was Mr. Kinney. "They have it for searching 202 and 207 and there is no such room as 202. They can't use this as legal evidence." The doctor said, "Search warrant for blame hotel, I will call up Jack. 682-J. Hello, what in the devil are you doing. Come down to the office. Well, I will see you in the morning. Some parties in my office now. Marsters searched the Vernon. Search warrant called to search room 207. There is no room 207. Searched anyway. They went into another room and found a little moon. Yes. There is no such room number up there as 207. Huh. Then they can't use that as evidence, can they. No. I will see you in the morning." Then, evidently speaking to somebody in the room, "Well, even if they do get us, it will only be a hundred dollar fine or three hundred at the most. You know when they got Carl they just soaked him a hundred.

We won't let this interfere, we will go ahead just the same."

That is all I got on the tenth.

The next time was January 11th in the morning. I was at the door. I did not look through the crack at that time, but I took down what I heard. Doctor's voice: "You have got to be careful now about your caches. I want you to change them every day. If necessary, more than once a day. I want you to get this now. Do you understand? That is a thing you have—When you go to different places you have got to register under fictitious name. I couldn't call you up and tell you this over the phone, so that is the reason I had to call you up. Go right ahead just the same as usual, only be careful about your caches." I did not see the person to whom he made these statements. That is all I got on that day.

I was at the door on January 12th about 11:00 A. M. Dr. Goodfriend was talking to a woman. This is what I got: "She said last night. The woman said you have got to tell me. She mentioned Pete Steunenberg, our good friends, thinks he will show up, now too busy. You have got to help me. You are the only friend I have. I don't know what you are talking about. Doctor's voice: "You can't do that unless—same line of business. That is the reason I am telling you. That's what you have got to do and that is what to do. Don't pay any attention. Go right along and saw wood, saw wood, that is all there is to it." Woman's voice: "Make those payments. Doctor until I make this. Now about that? What the hell!" Woman: "That is

what they are doing. She is going to get out. I don't like to tell Ed about it myself." Doctor: "Simply call her up." Woman: "She told me I don't care what they do, I don't care if they did catch you, you shouldn't tell a lie about it. The Mormon Church prays every day. They can't catch me. Don't know anything about me." Doctor: "Have to do something serious, sons of bitches. Lots of fellows jealous. Jim don't know much about it. Came up here and I came up here. I am telling you." Another man—a man's voice in the office: "Tell you right now—I don't know who the other man was. "That office Doc I heard this morning. Jim told me. Jim promised. Pete Steunenberg. There is some connection."

That is all I heard on that occasion.

MR. HAWLEY: We ask that be stricken out, your honor, as simply meaningless general words.

THE COURT: I think that latter may be stricken out.

MR. HAWLEY: That was the whole of the conversation stricken out?

THE COURT: Just the last one. The man that came in last.

MR. HAWLEY: I ask the whole conversation be stricken out.

THE COURT: What whole conversation?

MR. HAWLEY: Between this woman and this man—between Doc and this woman and this man. There is no meaning to it.

THE COURT: Motion denied.

MR. HAWLEY: Exception.

MR. HEALY: Do I understand that the entire testimony of the witness has been stricken?

THE COURT: No, just this—one last conversation, as I undertsand it, with a man who came in after the woman left, after the conversation with the woman.

ON CROSS EXAMINATION THE WITNESS, TAYLOR, TESTIFIED AS FOLLOWS:

Colonel Marsters sent me up to the Curtis rooms. The first conversation that I testified to was not the first time that I had been there. I was there on the 9th of January. I took down everything I heard. No matter who was in the room. If patients would come I would take that down. I would take down everything I heard. I knew what I was there for. I knew that the prohibition office was endeavoring to get evidence as to a conspiracy. There were other Prohibition agents in the rooms at the various times while I was in the Curtis offices. We didn't talk very much at the Curtis offices about the occurrences in the next room. There were conferences at the Prohibition offices at which the case was frequently gone over among us. On the night of the tenth while I listened I sat on the end of the couch. I had my left ear at the crack on the north side of the door. On the 11th I sat with my ear to the crack on the south side of the door, the one nearest the window. On the next day the same place. I was standing up. I testified to having heard someone call 682-J. That was on the evening of the 10th. I am sure it was Dr. Goodfriend who called. I was working constantly on the case for about 11 days.

Q. (MR. HEALY): Miss Taylor, you said you

were up there eleven days altogether. Will you just give me the dates of those days?

MR. McEVERS: Object to that on the ground it is immaterial unless he wants to know what she got. We have only asked her, if your honor please, on direct examination, is the day she heard through the door. I can't see where it is material as to what she did other times.

MR. HEALY: I am not asking what she did in those times. I am asking the dates of other dates.

MR. McEVERS: Object on the ground of incompetent, irrelevant and immaterial, improper cross-examination.

THE COURT: Of course, that will open up what she got on other dates, if you want to go into that.

MR. HEALY: We don't want to go into that at all, your honor. I am simply—

THE COURT: What would be the purpose of asking her whether she was up there on other days?

MR. HEALY: I am not asking her with reference to any particular days, but she has testified she was up there eleven days, and I am asking her what were the days. I don't insist on the question if it is a matter of—very objectionable to counsel.

THE COURT: Yoy may find out what she got the other days.

MR. HEALY: We withdraw the question if that is the Court's ruling, because we haven't particularly inquired about those other days.

THE WITNESS: It was the evening of the 10th

about seven or seven-thirty that the number 682-J was called.

MR. GIBSON: Miss Taylor, you don't attempt to state what individual made these various statements that you have testified to, do you?

THE COURT: She has stated.

MR. DAVIS: She has stated.

THE WITNESS: I have stated.

Q. (MR. GIBSON): At all times, you don't know who was talking.

MR. McEVERS: I object to that unless made more specific.

THE COURT: Yes, it would otherwise be misleading. She stated she recognized Dr. Goodfriend there at times and she didn't recognize the others. Now, you would have to fix the time and place, I mean the time of the particular conversation.

MR. GIBSON: I will just ask the general question so that we will get the ruling. In your testimony today, you haven't attempted each time to ascribe to any person talking the testimony that you gave?

THE COURT: The testimony shows for itself there.

MR. DAVIS: Yes. The testimony shows for itself as to that.

THE COURT: You may ask her as to any particular one or as to any particular time. That would be entirely legitimate. She has identified a portion of the notes themselves, at least.

MR. GIBSON: I should think the witness would know whether or not as she took these notes that she attempted to get identified as an individual that made

certain specific remarks, and I am asking her if that is her policy, or whether or not she attempted to do that.

THE COURT: I don't know about her policy. She gave the name several times. I think you ought to call her attention to particular times. Particular parts of the conversation as to whether she knew who said this or that.

MR. GIBSON: Well, if the Court please, I won't insist on that. We are trying to get through with the case, and that would take an hour or an hour and a half to do that.

THE COURT: Very well.

J. L. EBERLE, being sworn as a witness on behalf of plaintiff, testified as follows:

My name is J. L. Eberle. I live in Boise. I am a lawyer. I am a partner in the firm of Richards & Haga. I own a small tract of property about an eighth of a mile from the traveled—the mainly traveled road to Meridian. I don't know where the place is that is called Merrill's place, or some similar name. I acquired the property on the Meridian road about a year ago. I think that the property was listed the latter part of December. I think that it was in December, 1922, that I listed the property with the Day Realty Company of Boise. That listing was continued through January. The property had been listed but the listing was renewed in January. I think it was a few weeks after Christmas, I wouldn't be certain about that, that I had a conversation with Mr. Kinney, in the month of January concerning the renting or selling of that property. In any event, it was in January, and prob-

ably before the middle of the month that I met Mr. Kinney at the foot of the stair leading to the Court House and he inquired as to whether I desired to sell or rent this particular tract of land. It is in the Syringa Park Subdivision, and I told him that I preferred to sell it, but I might rent it subject to sale. There may have been some more to the conversation, but nothing in connection with that particular phase of it. The Mr. Kinney I refer to is Sylvester Kinney, the Deputy Sheriff.

ON CROSS-EXAMINATION, THE WITNESS, EBERLE, TESTIFIED AS FOLLOWS:

It is not a fact that Mr. Kinney at that time approached me about a still being on my place. A still was mentioned at that time, an old still on my place. About a week prior to that time, my recollection being rather indefinite as to how long before, Andy Robinson stopped me in the post office and told me he had found mash on this particular place and the particular morning that I met Mr. Kinney he joshed me about having found this mash on the place. Then he inquired about what I wanted to do about renting or selling the property. I had had the property listed in December with the Day Realty Company, for rent as well as for sale. I did not state that Mr. Kinney asked me at that time if I knew anybody who would like to buy or rent the place—except in connection with Mr. Kinney's inquiry. He said he thought he might know of someone who would be interested in either renting or buying the property, and I told him that I would appreciate it very much if he would find someone who would rent

or buy the property, that I preferred to sell the property, but I would rent it subject to sale.

ART MOUSER, being sworn as a witness on behalf of plaintiff, testified as follows:

The name of the party I took out to the cross roads near Whitney school is Mrs. Sorenson. She asked me to drive her to Whitney school. I understand that the place out there called the J. H. Evans ranch is right across the road from Whitney school. I have just been told that it is. I drove Mrs. Sorenson as near as about four or five hundred yards from that place. I don't know, independent of what has been told me, where the J. H. Evans ranch is. I have been told where it is. I know where the Goodfriend place is. I drove Mrs. Sorenson near—well, just across the road from the Goodfriend place. They were looking for a watch and they stayed there looking for this watch probably ten or fifteen minutes.

ON CROSS-EXAMINATION the witness testified as follows:

This occurrence was in the day time just after school was out. It was in the afternoon. Mrs. Sorenson went out to look for a watch. I believe she said it was a wrist watch but she wasn't carrying it on her wrist, she said. I brought her back. She hunted around for it along the side of the road on the right hand side of the road. She looked all the way along for a couple of hundred yards. I helped her hunt for it. I don't know what day that was. It was along in the fore part of January.

McKEEN F. MORROW, sworn as a witness on behalf of plaintiff, testified as follows:

I am an assistant in the office of the United States District Attorney. I know Sylvester Kinney, one of the defendants in this case. I had a talk in January of this year with Mr. Kinney about running a certain party for Mayor on a reform ticket.

Q. You may state the conversation.

MR. MARTIN: We object to this as immaterial and irrelevant. The fact that somebody spoke to him about wanting to run somebody for Mayor of this city.

MR. DAVIS: Your honor will recall that it has been testified here by two or three witnesses that it was agreed in the room in which the—Dr. Goodfriend's office they didn't have sufficient protection, and they were going to run Mr. Gibson for Mayor, and this is simply to show an act on the outside in furtherance of that agreement and as corroboration.

MR. SMEAD: I hardly think your honor remembers such a statement as that—as counsel puts it. I take exception. I take exception to his statement, there is no testimony they were going to put Mr. Gibson in so that they would furnish protection.

MR. DAVIS: No, they didn't say he was going to furnish them protection, but they were—

MR. GIBSON: Inasmuch as the conversation concerns me, since the District Attorney has already testified as to this matter, I have no objection to Mr. Morrow's giving testimony.

THE WITNESS: As I remember it was on the 20th of January, which would be Saturday. It might have

been on the day preceding, but my best recollection is that it was on the 20th of January this year, It was noon or just after noon. I was coming down town when Mr. Kinney came across the street back of the courthouse and met me on the sidewalk there and he said that there was to be a meeting either that night or the next night of some of Claude Gibson's friends to discuss his candidacy for Mayor. Mr. Kinney said that he and Sheriff Agnew were unable to get any cooperation with the police force and that the whole city administration from top to bottom was rotten, and he said they wanted to run Claude on a reform platform to clean up the town, and that he and Jim Agnew were anxious for Claude to run, and they wanted to get his friends together on the proposition.

MR. McEVERS, being sworn as a witness on behalf of the government, testified as follows:

I am an assistant in the office of the United States District Attorney in charge of the prosecution for violations of the National Prohibition Act. Just about that day Sheriff Agnew came to my office in the Yates Building for the purpose of conversation. Mr. Agnew came into the office; I was sitting at my desk. Miss Norma Hasser, my stenographer, was sitting just right close to where I was. Mr. Agnew asked for Colonel Marsters. I told him Colonel Marsters was out at that time. He said he was going out of town the next day. I think it was Saturday that he was talking to me. It may have been Friday, either the 28th or the 29th, right along there. He said that he was going out of town and would be gone for a couple of days, I don't

remember exactly how long he said. He said for me to tell Colonel Marsters that if he wanted any search warrants during his absence to tell him to go to Mr. Kinney, the man at the desk, to get it. He told me that the reason that he said that was that he didn't want them to go to Andy Robinson for it because he didn't trust Andy Robinson. That was the substance of the conversation. Then Mr. Agnew went out.

ON CROSS-EXAMINATION the witness testified as follows:

I am assistant United States Attorney in charge of prosecutions for violation of the liquor law. I have my offices in the Yates Building. My office is in the same suite with the prohibition offices. Of course, I also have access to Colonel Davis' office and work both places. My principal duties are in connection with the office of Colonel Marsters, and the various prohibition agents maintained in the Yates Building. I have nothing to do with getting out search warrants. I have heard Colonel Marsters and his agents talk about working with the sheriff in getting their search warrants right along, that is prior to that time. They quit then and didn't do it any more. My understanding is that the Federal law is very stringent in getting search warrants and, of course, this is more or less of a general understanding that they could go to the sheriff's office and get them, very naturally, and get a couple of the sheriff's office to go with them and make state cases of them. There is more latitude on the part of the sheriff's office and in getting search warrants from the state authorities, and as a rule the law as to Government

search warrants is much more strict. The sheriff could obtain a search warrant that would enable them to search the house itself and even if they did not have a warrant they could use it as evidence in a state court. I think it is correct to say that that is the reason the United States authorities were working with the Sheriff's office. So far as I know, the Federal prohibition officers were working together in harmony with the sheriff's office, I don't know.

C. D. STEUNENBERG, being recalled as a witness on behalf of plaintiff, testified as follows:

The first day, January, 1923, I had a conversation with Mr. Griffith concerning the Ed Kemp place. Kuchenbacker, Reynolds, Henry Griffith and myself were present. We had searched two places that day and when we got back I was with Chief Griffith on the last one. I was the only one of the Federal boys that was with him. When we got back Agent Kuchenbacher and Reynolds were in the police department waiting for us and Mr. Kuchenbacher said he would like a search warrant for a place down on Idaho street that day, and Mr. Griffith asked him what place it was, and he said it was 1017, and he said then, "Who does it belong to, or who is the party that occupies it?" And he said, "A man named Ed Kemp", and Mr. Griffith says, "Well, I haven't any more search warrants today." Then they, Mr. Kuchenbacher, I think, made this remark: "I certainly would like to knock that place over." And Mr. Griffith asked him then what information he had, and stated that he had watched Mr. Kemp a number of times and was satisfied he was

selling liquor and had liquor in the house. Mr. Griffith said again that he had no more search warrants. I wouldn't say that I have gone to Mr. Griffiths personally very many times for search warrants. I have gone to him a couple of times. I asked him about two places that same day. He didn't hesitate at all on those places. I told him though what I had. I did not have any more than Kuchenbacher had.

CROSS-EXAMINATION
BY MR. CAVANEY:

Mr. Griffith never hesitated on any personal request of mine. I did not go and procure a blank search warrant on that occasion because I couldn't get a Federal search warrant. I made no further effort to get a blank warrant that might be filled out for that place that day. Neither Mr. Kuchenbacher nor anyone else attempted to do so so far as I know. That was New Year's Day. I did not get any official warrants that day. Mr. Griffith did. He had two. They were gotten that day, that is, he had them that day, got those in his office. I don't know when they were originally gotten. I know he didn't have them for those places right when I went in. My impression is that the business houses were all closed on that day and the Courts were closed. Mr. Webb had come and talked to me about the sale of liquor being made in the Sorenson rooms.

Q. Do you know who sent him to you?

MR. DAVIS: Objected to as improper cross-examination.

MR. CAVANEY: I think, your honor please, this witness, Mr. Webb talked directly to the witness and

so testified Mr. Griffiths had sent him to Mr. Steunenberg with this information in regard to the Sorenson rooms.

THE COURT: Mr. Steunenberg hasn't testified about the Sorenson rooms at all.

MR. CAVANEY: No, but I asked him if this Mr. Webb came to him.

THE COURT: How is it proper cross-examination?

MR. CAVANEY: I wanted to ascertain if it was a fact that Mr. Webb did come to him.

THE COURT: Sustained.

THE WITNESS: I testified that on the other two occasions I had stated to Mr. Griffith without his inquiring what the evidence was that I had. When Mr. Griffith made his inquiry on the third occasion, he hadn't been informed as to what the information was which the Federal prohibition agents had. I first went to Mr. Griffith about one o'clock on the first of January and gave him the information at that time. Then I procured the warrants and made the raid.

MR. HEALY: The point I had in mind, if your honor please, is that Mr. Steunenberg volunteered the information to Mr. Griffiths on the two previous occasions and the information was not volunteered on the third occasion and Mr. Griffith asked for it. That is all I was bringing out.

THE COURT: Well, on each occasion the information was given to Mr. Griffith.

THE WITNESS: Yes, but Mr. Griffith asked the question of Mr. Kuchenbacher. I suppose Mr. Kuchenbacher expected me to tell Mr. Griffith the facts in

regard to the last case, but I didn't know then when I asked for the warrant. Then Mr. Griffith asked what place it was. Then he got the information the same as when I went to him in the first place. I told him I wanted to get a search warrant for the Oregon Hotel and went right ahead and told him what information I had. The situation is that I volunteered the information where these places were on the first two occasions and it was not volunteered by Mr. Kuchenbacher on the third occasion and he asked for it.

I didn't have a Federal search warrant. I hadn't tried to procure one. You get a search warrant under a different law when you get one from the city. I never did try to get a search warrant for the Kemp place on Idaho Street because we found out very soon after ward that Mr. Kemp was mixed up with a different organization.

THE COURT: Just explain why you didn't. Your explanation isn't sufficient.

A. We were getting information and we didn't want to spoil the source. We didn't at that time have sufficient evidence to get a Federal search warrant.

WILLIAM CAMPBELL was sworn as a witness on behalf of plaintiff and testified as follows:

My name is William Campbell. I am elevator operator in the Empire Building. I have been elevator operator since a year ago the first of last June. I was there November and December of last year, and January of this year. I know Sheriff Agnew by sight only. I remember carrying Mr. Agnew as a passenger in the elevator about the latter part of November and the

first of November, and occasionally in the month of December, about Christmas time, once or twice. I don't believe I seen him in January. As I was working in the evening and on Sundays it was usually in the evening that I noticed him. I would say about seven o'clock in the evening. I could not say that I noticed him there on Sundays at all. When Mr. Agnew left the elevator he went to Dr. Goodfriend's office. I saw him go there every time I saw him go up in the elevator. I mean that I saw him go to Dr. Goodfriend's office every time I saw him go to the fifth floor. Sometimes he would go to the sixth floor. I study on the fifth floor at nights and I would take Mr. Agnew to the sixth floor and he would go down to the fifth floor and occasionally he would come down from the sixth floor and go into Dr. Goodfriend's office. Most of the time he would come down to Dr. Goodfriend's office from the sixth to the fifth floor at a time just about long enough for him to get around to the end of the hall, around to Mr. Delana's office, and then walk back. That is the way I considered it. It would be a matter of just a few minutes. I don't think I know Mr. Kinney, Mr. Agnew's deputy; I might know him by sight, but I don't know him by name. I see Mr. Sorenson and Chief Griffith in the court room. I believe I seen Mr. Griffith in the early part of the fall and then about two weeks before the indictment came up one Sunday morning; by early fall I would say in November some time. I wouldn't say that I had seen Chief Griffith go to Dr. Goodfriend's office more than two times.

Q. (MR. McEVERS): Calling your attention to

the gentleman who sits with his head down there, with the glasses, just back of Mr. Gibson—

MR. SMEAD: I object to the prosecutor stating somebody sits there with his head down. I object to these inferences.

THE COURT: Gentlemen, I don't think there could be any inferences from that.

MR. HEALY: The intended inference is very obvious.

MR. DAVIS: He did have his head down so it couldn't be seen. You can explain that yourself.

MR. MARTIN: I would like to have an exception to that remark of counsel, that we can explain that ourselves.

THE COURT: Yes. The jury will not pay any attention to that.

THE WITNESS: I don't believe that I have ever seen the gentleman sitting behind Mr. Gibson in my life. I know Ed Hill, City Detective, by sight only. but I didn't know his name until he was pointed out to me after the indictment.

MR. GIBSON: I want the record to show that this gentleman that he said he had never seen in his life, sitting behind me, is Mr. Kinney.

MR. DAVIS: Yes, it may very well show that.

THE WITNESS: I don't believe I see Mr. Hill in the courtroom now.

Q. Calling your attention to the defendant who sits down to the right of Dr. Goodfriend, let me ask you if you remember taking him up in the elevator.

A. I cannot say that I do. I can't say that I have ever seen him in there.

ON CROSS-EXAMINATION WILLIAM CAMPBELL testified as follows:

I occasionally work on the elevator in the day time. I haven't any special way of fixing the time or times when I saw Mr. Agnew about the Empire Building. It is not my business to look into the business of anybody else. The only way it would attract my attention would be in being an officer of the law and me being a little bit curious, and I watched him to see if anything was coming up. I wanted to see if he would arrest anybody. That was my impression the first time I saw him; to see if he was going up there to carry out the duties of his office. I have seen Mr. Agnew in there quite frequently. I know positively that he went to Mr. Delana's office, the Prosecuting Attorney's office, at times. I know that other officers, state and county, come in and go in that elevator to the various parts of the building, and city officers more than likely do. I don't know all of the city officers and don't come in contact with very many of them. I didn't keep a notebook of these things that occurred. I had no reason for so doing; until the middle of January of this year the Prosecuting Attorney of this County, Mr. Elbert Delana, had his offices on the sixth floor of the Empire Building. I couldn't say that Mr. Agnew had gone around to Mr.Delana's office and then back down to the fifth floor of the Empire Building again. I said he had time enough to get to some point on the sixth floor before he came back. I meant that he had time enough

to go around to the end of the hall where Mr. Delana's offices are. So far as I know Mr. Agnew on that occasion may have gone to Mr. Delana's office for the purpose of seeing him before he came down to the fifth floor. I couldn't say whether Mr. Delana was in or not. A great many people come down to Dr. Goodfriend's office. Mostly on Sundays that I noticed. I am on in the day time on Sunday and a great many people come there on Sunday, apparently patients of his. As far as I know, they are people of all classes and kinds, young and old, male and female. I had no particular reason at any time for watching to see who went to Dr. Goodfriend's office. As I worked on the elevator there were so many classes of people coming up I paid no attention to who it was. At night when I am about the building and not busy I spend my time as a rule in the doctor's reception room and study there. I used his table and lamp. He leaves the door open for me. The reception room of Dr. Goodfriend is never locked. I never knew it to be locked. Very frequently the door from his reception room to his private office is left open all night. I can't say that that is usual, but I have frequently found it open.

I would say about November, I couldn't say exactly when it was, that I saw Chief Griffith come into the elevator of the Empire Building. This was in the evening. He went to Dr. Goodfriend's office on that occasion. I was not studying in the doctor's office that night. Whenever I would be studying in the doctor's office and anybody came or his patients came in it was none of my business to stay there, so I usually went

and stayed outside until he was through. I couldn't say how long Chief Griffith stayed there on that occasion; I don't remember. So far as I know he came there as a patient.

I saw Chief Griffith in the Empire Building on Sunday morning about two weeks before it was announced that a charge had been brought against these men. That is the only other time I ever saw Chief Griffith about there. I don't know how long he was there that time. I don't know what he went there for or what he talked about.

I know Carl Sorenson only by sight. I didn't know his name at that time he came up there. I have seen him during the trial. He was pointed out to me in the hall. The reason I remember that it was Carl Sorenson that had come up in the elevator is because I know a man when I see him twice. I saw Mr. Sorenson frequently. I saw him come up there five or six times. Carl Sorenson was coming to Dr. Goodfriend's office for quite a long period of time. Ever since last fall, as I recall. His wife or some lady also came with him to Dr. Goodfriend's office for a great many months. Mr. and Mrs. Sorenson came together. I noticed them coming first the latter part of the fall. As far as I know they came to Dr. Goodfriend's office just as the other patients did.

WILLIAM H. KINGSLEY, being sworn as a witness on behalf of plaintiff, testified as follows:

My name is William H. Kingsley. I am elevator operator in the Empire Building in the daytime. I have held that position two years. I know Sheriff

Agnew. I have carried him up as a passenger in the elevator. I did this in the latter part of the fall and January of this year. He has been up there several times. Sometimes he went to the sixth floor and sometimes to the fifth. On the fifth floor he went to Dr. Goodfriend's office, and I should judge I have seen him go to Dr. Goodfriend's office a half dozen times. I don't know Mr. Kinney, his deputy. I don't recognize him or know him at all. I know Chief of Police Griffith. I have seen him go up in the elevator not more than two or three times. He would go to Dr. Goodfriend's office. That was, I should judge, about the middle of January. I would recognize Mr. Ed Hill, the City Detective. I see him in the courtroom. I have seen him go up in the elevator. He went to Dr. Goodfriend's office. I have seen him go up there two or three times is all that I remember of. I know Ed Ward. I see him in the courtroom now. I remember taking him up in the eleavtor. He would go to Dr. Goodfriend's office. I know Mr. Sorenson by sight only. I remember taking him up in the elevator. He would go to Dr. Goodfriend's office. I know Mrs. Sorenson. I have frequently taken her up in the elevator. She went the same place. I don't know Ed Kemp. I don't know Mr. Kinney. He may have went up there, but I didn't notice where he went. The only reason I watched these people go up, the sheriff and some of the others, was because they were county officers and I knew it, and I wanted to see where they went.

(Mr. Kinney was pointed out to the witness.)

THE WITNESS: I recall seeing him go up in the

elevator frequently. He would go to Dr. Goodfriend's office.

ON CROSS-EXAMINATION the witness testified as follows:

The only reason I have to remember the time or times I saw these different people go into the Empire Building was through curiosity. I didn't have curiosity enough to cause me to remember the dates. I do not keep a diary or a note book of those things. Sheriff Agnew used to come quite frequently before election and right afterwards, and then his visits kindly dwindled away until he ceased coming entirely. During the political campaign last fall he came to Dr. Goodfriend's office quite frequently. Mr. Kinney used to come up there during the campaign also. Mr. Agnew's visits dwindled after the campaign until he didn't come up any more at all. Mr. Kinney hasn't been up there since the campaign that I remember of. I don't remember just when I saw Carl Sorenson coming into the building. He and his wife have been coming to the Empire Building and Dr. Goodfriend's office for quite a long time. I can't remember that. Dr. Goodfriend had a great many people coming to his office. It was usually the same bunch that went back and forth. I don't mean that the same people came every day, but you could recognize them as being there before usually. I recognized the patients and clients of the other doctors and lawyers in the building in the same way. Usually in the morning there was considerable passage back and forth to Dr. Goodfriend's office. I had no occasion to go down to Dr. Goodfriend's reception

room. I would go about in the hall sometimes. Usually the doctor receives his office patients in the morning. Most of the time in the afternoon the doctor wouldn't show up. I wasn't there in the evenings at all. The different times that I saw different people go there, the ones I have mentioned, were usually in the morning. I didn't intend to say definitely just how many times anybody went there, or in just what months they went there, only that Mr. Agnew and Mr. Kinney went there before election and directly afterwards. I learned from Dr. Goodfriend and hearing him talk that during the campaign he was supporting Sheriff Agnew for election—before the campaign he wasn't, but just a few days before he turned. Just before the general election he was supporting Sheriff Agnew. It was during that time that the sheriff and Mr. Kinney were up there. I don't know Mr. Hill only by sight. I had him pointed out to me the other day. I saw him go up several times in the elevator. One of the gentlemen standing outside pointed him out to me. I don't remember just who. It was while Mr. McEvers was addressing the jury. Mr. Griffith was sitting on the end and Mr. Hill sat next to him was the way he was pointed out to me. It wasn't one of the federal officers who pointed him out. It was someone standing in the door at the time. I think I carried Mr. Hill in the elevator almost entirely during the month of January. I don't remember whether it was during the time of the Caviness trial or after the murder or not. He always went to Dr. Goodfriend's office. He didn't go to Mr. Delana's office that I re-

member of. Usually in the morning between nine and ten there wouldn't be much doing on the elevator and I always stopped the elevator where the last one comes from and I would naturally stand in the door and watch where everyone went, usually. I can't now remember distinctly where all the passengers went. Mr. Hill may have gone up to Delana's office. I didn't notice him go there because Mr. Delana's office is around the corner. I couldn't remember of seeing him go in that direction. I don't mean to tell you that I have never carried Mr. Hill to the sixth floor, but I don't remember carrying him there.

The reason I know Mr. Griffith went to Dr. Goodfriend's office was because Mr. Griffith was in uniform. I was naturally curious to see where he went. Chief Griffith may have been in the Empire Building before, but that is the only time I have definitely watched him to see where he would go. It is usual for other people to go into the building in uniform. I was curious to see where the chief of police would go. If passengers were officers of the law I usually watched where they go. The reason I remember where he went was because I stood in the door and watched him go in. Nobody has talked to me about this testimony. I talked to Mr. McEvers what I was going to testify to. He wanted to know what I knew about the case. I told him what I knew. I don't remember distinctly whether Chief Griffith had a uniform on in January. I remember he went up to Dr. Goodfriend's office with a uniform on; that is all I remember. I don't know whether it was November or when it was. I don't

know wheter he had a uniform on in January or not. Mr. McEvers did not suggest any of these dates or times to me. I have seen Chief Griffith there two or three times, but I don't believe any more than that; I can't give the dates. I can't tell where any other uniformed officer went on any particular date. Sheriff Agnew was there in January or December. He doesn't wear a uniform. The only thing that attracted me was that I wanted to see what he was going to do up there was all. I didn't know Chief Griffith without a uniform. You know he has on his uniform the word "Chief". Of course, I didn't know his name at that time; I should judge that was during the month of January. I couldn't say positively. I never recall his going to the sixth floor in his uniform. I haven't known Chief Griffith very long. I didn't know who he who he was when he went up there to the office. The first time I learned what his name was I asked who the Chief of Police was, and they told me it was Henry Griffith. That was several days after he was in the Empire Building. It was some time in January, I can't state exactly. Mr. Hill did not have uniform on. The Empire Building has six floors and these floors are all occupied by business and professional offices. Hundreds of passengers go up and down that elevator every day in the week.

HARRY R. AIKMAN, being sworn as a witness on behalf of plaintiff, testified as follows:

My name is Harry R. Aikman. I live at 406 Empire Building. I am janitor of the building. I have been janitor since October 1, 1922. As janitor my

duties call me to the fifth floor of the Empire Building. During the months of December, 1922, and January, 1923, I have seen Mr. Agnew, the sheriff, go to Dr. Goodfriend's office. I should say that occurred four times to my knowledge. I know Chief of Police Griffith by sight. I have seen him go up there two times. That was about the end of the year or the beginning of the year, about three weeks, more or less. I don't know Sylvester Kinney, deputy sheriff. I don't recognize him sitting here. I do not recognize Mr. Hill. I know Mr. Ed Ward. I saw him on one occasion up there. I know the Sorensons. I have seen them go into Dr. Goodfriend's office. On one occasion I saw Mr. Ward come out of Dr. Goodfriend's office. That was within a month of the first of January.

ON CROSS-EXAMINATION the witness testified as follows:

I didn't notice what condition Mr. Ward's face was in when he come out of Dr. Goodfriend's office, I didn't pay any attention. I do not observe the movements of everyone who came into the building. I haven't talked this matter over with anyone. I knew when I came here this morning that I was going to be called on to testify. I testified before the Grand Jury. I was interviewed by Mr. McEvers with reference to these different parties I testified to. I have no way of saying definitely how many times I saw Sheriff Agnew. I would say that I saw him four times. I saw him for the first time about the beginning of December, the second time during the month of December, the third time toward the end of December, and

the fourth time in January, about the end of January. I don't know definitely what time in January it was. I couldn't say for certain whether it was after the middle of the month, I have no reason to take dates of things. I didn't keep any memorandum of any of this. I didn't expect at all to be called upon to remember these occasions. I took no particular pains at all to try to remember it. I see a good many people go through a good many different offices there. I never saw Sheriff Agnew go to any other office in that building. I never saw him go to the Prosecuting Attorney's office. I don't suppose I could tell you now any particular time when I saw anybody else go to anybody's office in the Empire Building. I see hundreds of people in the office building every day.

W. P. RICHARDS, being sworn as a witness on behalf of plaintiff, testified as follows:

My name is W. P. Richards. I live at 848 Warm Springs Avenue. My business is real estate. I have the management of the Empire Building in Boise, Idaho. I had a conversation about February 28, 1923, with Dr. Goodfriend concerning his office. He called me in to look at a door that was in the next room, that is in the room that Curtis was occupying, and told me that he would like to have it fixed. I told him that I would fix it, which I did. Dr. Goodfriend said that someone had told him that the Ku Klux were after him and he would like to have me fix that door. I looked at the crack in the door. There were cracks there.

ON CROSS-EXAMINATION the witness testified:

The date referred to was February 8th. I think Mr. Kingsley fixed the door the same day. How I fix the date is when I went out of Dr. Goodfriend's office I crossed right over to E. C. Boom's office and collected the rent, and I entered the rent on the 8th day of February. The date is from records of my own. I told Mr. James Kingsley, the engineer there in the building, about fixing the door and left it to him to fix it. Dr. Goodfriend simply mentioned that the Ku Kluxes were after him. He said it in a rather joking way. He simply mentioned that somebody told him that the Ku Kluxes were after him. What he was serious about he wanted to have that door fixed. I rented the room to the Curtises adjoining Dr. Goodfriend's office on the 21st of September, 1922. I think Mr. Curtis' wife came up there several days after that. He told me at that time that he would like to have her there. I told him that we didn't rent housekeeping rooms, and he said they didn't intend to be there for housekeeping, but we wouldn't have any trouble on that account, but for a short time they would like to have her there. That was all. Curtis wanted these particular rooms. There didn't any other room suit them but that one. I told him I had some other rooms I was going to show him and he said that room suited him the best.

Q. He wouldn't even look at the other rooms, would he?

A. He didn't look at the others, no.

WILLIAM A. KINCAID, produced as a witness on behalf of plaintiff, testified as follows:

I am County Assessor of Ada County. I have been for ten years. I have assessed the northeast quarter of the Northeast quarter of section 13, Township 1 North, Range 1 East Boise Meridian to Sylvester Kinney. That property is about seven miles south and three miles west, I think, of Boise. I assessed Lot 10 of Syringa Park Addition to Sylvester Kinney. I think that is in the neighborhood of four miles west of Boise. It might be a little more than that. It is on the Boise-Meridian road, a little south of the road.

ON CROSS-EXAMINATION the witness testified:

One assessment was made on the 12th of May, 1922, and the other was on the second of June, 1922. I haven't investigated to whom Lot 10 of Syringa Addition is assessed for the year 1923.

HARRY S. BRIGGS, being sworn as a witness on behalf of plaintiff, testified as follows:

My name is Harry S. Briggs. In the month of December I was a member of the Boise City police force. On the 29th of December I was asked to resign. It was about 8:30 in the evening of that day.

ON CROSS-EXAMINATION the witness testified as follows:

And do you know why you was asked to resign?

MR. DAVIS: That is objected to as not proper cross-examination. I am simply fixing the date. We are not going to try out the merits of his connection with the city.

THE COURT: I don't know just where to limit you. I think counsel have a right to go into it to some extent, that is, under the circumstances. I doubt

whether this is, strictly speaking, cross-examination, on reflection.

MR. CAVANEY: Then we will not insist on it.

THE COURT: Very well.

MR. SMEAD: For the sake of this record, your honor, in behalf of the defendant Goodfriend, I move that all of the testimony of the last witness be stricken out because there is no connection shown whatever between this man being asked to resign by his superior officers and anything that has been testified to connecting the defendant Goodfriend.

THE COURT: Of course, it will not be considered against the defendant Goodfriend except as it may connect itself up by reason of other circumstances.

MR. SMEAD: The point I make is that there is nothing connecting it up.

MR. CAVANEY: I would like to make the same objection to the defendant Griffith as not being connected in any way with anything that would affect the issues in this matter.

THE COURT: With that explanation to the jury, that explanation that I have given again and again, both motions will be denied.

MR. SMEAD: We take an exception.

HERE THE GOVERNMENT RESTED.

MR. MARTIN: I desire to make a motion that the defendant Hill be discharged or that the Court instruct the jury to find him not guilty on the ground that there is no evidence whatever to connect the defendant Hill with any conspiracy as charged in the indictment.

THE COURT: The form of the motion is of unimportance. I understand your motion.

THE COURT: I think, gentlemen, I shall regard your motion as premature. The cause perhaps would have to be finally submitted perhaps before I could consider it. I will deny it without prejudice to such a motion when the case is ready for submission.

MR. CAVANEY: I would like to make a similar motion on behalf of Defendant Griffith.

MR. HEALY: I desire to make the same motion on the behalf of Defendant Ed. Ward.

THE COURT: Very well.

MR. HEALY: I would like to take an exception to the denial of the motion.

An adjournment was thereupon taken until 9:00 A. M. Friday, March 2, 1923.

Defendants waived opening statement.

ANDY ROBINSON, called as a witness for defendants, testified as follows:

Name, Andy Robinson; residence, Boise. Undersheriff, Ada County for past two years; started beginning of Sheriff Agnew's administration; am second highest in rank.

So far as I know I am acquainted with all the business of the office concerning enforcement of liquor laws; no particular person is selected for that; I am away from the office at times.

In December, 1922, two young men, Goodnough and Gravin, were arrested by Sheriff Agnew and myself, on the bench at a dairy about two miles from town for drunkenness, and brought to jail. This was about

Christmas time; next morning Sheriff Agnew and myself attempted to ascertain from these parties where they obtained their liquor; Sheriff Agnew called Goodnough in his office and talked with him in regard to where he purchased this liquor; he gave myself and Mr. Delana, the county attorney, the information that he obtained the liquor at the Union Rooms; he conferred with Mr. Delana, myself and Sheriff Agnew's office; after we obtained the information, I imparted it to Sheriff Agnew; at Mr. Delana's instruction, Sheriff Agnew and myself took these men to Judge Norris' Court; a warrant was handed me to serve on the lady from the Union Rooms, Mrs. Goldsbury; Sheriff Agnew was aware of this move, of the information given in regard to the Union Rooms, and did not dissent from the proceedings that were being inaugurated.

ON CROSS-EXAMINATION the witness testified as follows:

Mr. Delana and I had the conversations with these boys in a room adjoining the sheriff's office, and this was not in Mr. Agnew's presence. I told Mr. Agnew about it and Mr. Delana took charge of the prosecution.

JAMES D. AGNEW, a defendant, testified as follows:

Name, James D. Agnew; residence, Boise; have lived here my entire life, 53 years; was born here. Am sheriff of Ada County, have been since January 10, 1921. Was re-elected for the present term; I was sheriff in 1903 and 1904; was once connected with the postoffice in Boise.

I have a wife, and one daughter in the State Univer-

sity at Moscow at the present time; I have known Dr. Goodfriend for three or four years; just knew who he was; was a candidate for sheriff in the last primary election, and there was opposition in my party, the Republican party. It was very vigorous; I knew the attitude of Dr. Goodfriend toward my candidacy prior to the primaries. He was very much against me; the first talk I had with Dr. Goodfriend during the campaign was on the night of the primary election, August 1st or 2d, in front of the *Capital News* office after the election returns were practically all in. I was talking with Carl Norris, Justice of the Peace, and Dr. Goodfriend came up and congratulated me, and said he fought me hard in the primary. I said there were no sore spots with me. He said he only gave me one barrel this time but would give me both barrels at the general election. He said it was not because of me but on account of one man in my office, Bud Driscoll; he said he would continue to fight as long as I kept that man. I said I had been talking that matter over with several people; I had just been talking about it with Norris; I said I would see him again in a few days; that I had practically decided that I couldn't keep Driscoll; people didn't want him in the office, and I had found out a lot of things recently that I didn't know before. He said any time I wanted to see him come up to the office and talk it over.

I saw him a day or two later on the street and told him I had decided to let Driscoll go; he invited me to come to the office some time and talk it over.

A few days later, Deputy Sheriff Kinney said he

thought Goodfriend was a pretty good vote getter, I had better go up and see him; Kinney and myself went up and talked over the political situation with Goodfriend; he said if I would let Driscoll go, he would help me all he could, he couldn't vote for the Democratic nominee and would be glad to help me.

Dr. Goodfriend was a Democrat. He had personal reasons for not supporting the Democratic nominee; later on I saw him several times. We talked the situation over thoroughly as to different groups of votes and organizations, the Grange, different precincts, lodges, churches, Ku Klux Klan; he said he couldn't support the Democratic nominee because he was endorsed by the Ku Klux Klan. I visited him frequently during the campaign, I gave him $100.00 for campaign expenses; not for his own services; I was at his office quite frequently during the campaign; my business was entirely political.

A few days after election in November, I went to Dr. Goodfriend's office with Mr. Kinney, talked over the result of the election, the hard fight, the demands made on me by different people, and general discussion of what happened; I don't remember the exact date; in the first part of December I was there at his office again; about a year before I had a hard spell of pneumonia, my lungs were bothering me and I had received a letter from Judge Hodgins at Moscow, my brother-in-law, advising me to get some oil of some kind, or ask some physician what was best for my lungs; I had been up to Mr. Delana's office; on my way down I stopped at Dr. Braxtan's office; he was not in, and I

went to Dr. Goodfriend's office and asked him what was the best kind of oil for me to use; we had other conversation; Kinney had reported to me that Goodfriend had told him about the location of Carl Abbott's still and equipment, and Goodfriend said to me he understood we had been close on Abbott's trail. I said, "I don't know whether I have or not, I have been working on the case." He said, "You must have been pretty close on to him because he got scared the other night and loaded his barrels and stuff into a wagon and hitched it on to the hind end of his car and moved further on over into the Mayfield country, and I understand he is on one of Hugh Sproat's ranches." That is all the conversation that I remember.

I was in his office later on in December, in his inner office, I don't think the door was closed; I was talking in the ordinary tone of voice, there was never any occasion for anything else; no one else was present that I remember of. I had no talk about any still except the Abbott still; nothing was said about the barrels except what I have already told you. I did not know Carl Sorenson at this time; I had seen him late in October when myself and two deputies raided the Union Rooming House, which he and his wife were running at that time.

Referring to the first conversation with Goodfriend in December, we talked about Carl Abbott; there was no talk about a still except Abbott's; no talk with reference to anyone by the name of Carl except Carl Abbott; there was no talk on this occasion in regard to cleaning up different places in town; Dr. Goodfriend did not

run over a list of places at that time; at some time or other Mr. Kinney had told me about having a list of bootleggers who were operating in Boise, and about how many there were here; nothing was said at that time about my helping clean up the town, and always being a boss.

The conversation about the middle of December was occasioned by my going to Goodfriend's office to see if anything was left from the campaign expense fund I had given him; that was my particular object, I was needing a little money; at that time I talked with him in his front office. I don't remember going into his back office. I asked about the money and he said he thought there would be something left, he had a few little expenses to pay; would check up on it and let me know later; at that time we talked about the man by the name of Stewart who had been arrested for working a still out on the highway. We spoke of the raid and about my having gotten into the wrong Stewart place, another fellow by that name. I think I brought the matter up. I can recall no other conversation at that time. There was no talk about stills, liquor or the actions of myself and others, in connection with the liquor traffic. There was no talk at this interview such as has been testified to by Mrs. Curtis or Mr. Kuchenbacher, except the conversation just related.

In the first part of January, I talked with Goodfriend in his office about a letter from some one at the White House he had received from Chicago stating that Stewart was there. Stewart had been released on bond and

didn't appear and his bond was forfeited, and a bench warrant issued for him; I aked Goodfriend if he could find out about the letter at the White House and that it might help me to locate Stewart. He said he didn't know, he had understood that Stewart was in Pocatello; he said he would make an effort to find out about the letter.

There was no conversation about the Union rooms; he mentioned that we had gotten the Union Rooming house again and I said, "Yes, a few days ago"; and he asked who the boys were that were arrested in the case, and I told him Goodnough and Gravin. He wanted to know where the arrests were made and I told him on the bench. He asked if they had been drinking or were drunk when we got them, and I told him yes, they were pretty drunk and were disturbing the peace, and we were called over on that account. He said he understood they got the stuff at the Empress from Jess Abbott. I said they didn't tell me where they got it, but later on told Delana that they got it at the Union. He asked if I thought they could make a case like that stick, and I said I didn't know, that that was up to the jury whether or not they would believe the testimony; there was no further talk that I recall about that matter; I don't recall any other such discussion at that time. There was no such conversation as related by Mrs. Curtis or Mr. Kuchenbacher concerning the Union rooms; Dr. Goodfriend said at that time that something about Mrs. Sorenson or Mrs. Goldsbury, that she was having hard luck, was sick. I think he said he was sorry for her, I wouldn't

be sure; I don't recall his giving any reason for it; there was no talk about a check coming to me from the Union Rooming House, there was never any such talk with him or anyone else; I recall no talk about the Federal officers watching that place or any other place; I don't think I mentioned Federal officers.

In December I had told Dr. Goodfriend I had a note at the bank. Early in January he asked me if I was going to be able to meet it and I told him, yes, I could take care of it out of my salary and the board bill for the last quarter. That was all the talk at that time. In December when I went to see if there was any money left from the campaign fund, I told him I had a note coming due and other expenses for Christmas, and would like to get the money if there was any. I never had any talk with Dr. Goodfriend about bonded liquor in connection with Mr. Smead's name. He never said with reference to Mr. Smead or anyone else that he wanted bonded liquor in his office or anywhere; nearly every day people josh me about liquor, the price of moonshine or about the chance to get a bottle or something like that; I never mentioned to Dr. Goodfriend his leaving his door unlocked. Such an idea never occurred to me. It was none of my business.

About the middle of January, the 14th or 15th, which date I fixed because I expected to go to Portland on the 16th to Sheriffs' Convention, in his inner office, I think I was sitting in a chair and a few feet from the door by the partition in the corner of his room, in a chair that was nearly always there. He was sitting at his desk, the usual place. The door between the inner

and outer office was open. I don't remember anybody else in either of the offices; I went there to see about the money again. He hadn't said anything about it; I told him I was going to Portland in a day or two to the Sheriffs' Convention and I was needing a little money, asked him if he had gotten checked up yet on that fund. He said he had $24.50 for me. He gave me $25.00 in bills. I felt in my pocket, took out my purse and said I didn't have the right change. He said let it go as it looks.

There was absolutely no other talk at the time in regard to the money. I never before received money from Dr. Goodfriend any place or at any time, or at any time afterwards. At that time he asked me if I knew who signed the affidavits for the Vernon Hotel raids. I told him I didn't. He didn't ask me to find out in regard to it. We had no talk regarding Colonel Marsters in connection with raid or otherwise; that was all the conversation as nearly as I can remember it; there was nothing said in regard to liquor or in regard to having a place to keep a certain amount of liquor on hand; there was no such conversation as testified to by Mrs. Curtis in regard to any of those things or by Mr. Kuchenbecker. I had no other conversation with Goodfriend outside of the one I related, I haven't been in his office since January 15th. Since the middle of January I have had no talk with him in regard to liquor traffic or people engaged in it.

In January my office force were Undersheriff Robinson, Deputy Brown, Deputy Kinney and Deputy Hardin.

I know Mr. Steunenberg, prohibition agent, in Portland at the Sheriffs' convention at the Imperial Hotel. He mentioned the arrest of Kemp. I said it was quite a grab you made the other day south of Boise. He told me the amount of stuff they got, what a complete outfit it was, and said some woman told about having to cross the lot several times and became suspicious and told him about it. At one time I told Mr. McEvers, Assistant United States Attorney, about getting search warrants. We had previously talked over these matters at a meeting in the City Hall between Mayor Sherman, Chief of Police Griffith, Chief of Constabulary Hiatt, and myself, and part of the time Mr. C. C. Anderson was present. We talked over the matter of cleaning up Boise and trying to do something about people who were handling liquor and narcotics, and it was mentioned at this time that some one had been tipping off the raids before they were made; shortly after that I taked to Mr. Marsters, the prohibition director, and it was decided that they could get search warrants through my office and in fact I had gotten a number of warrants and had gone out and made raids before that. I went to Mr. McEvers at Marsters' office and told him I would be gone a day or two and that it had been reported that someone had been tipping off the raids. I said I would hate to think I had such a man in my office and didn't believe I had; I said I didn't know whether it would be Robinson, Brown, or who it was, but if I were away and he wanted a search warrant he could trust Kinney, that is, the man at the desk, and get the warrant from him.

I had at all times cooperated with the prohibition office and had never refused to assist in suppressing the liquor traffic in my own county; I have cooperated with the State Constabulary and other officers, have never refused assistance of my office; after we had made several raids on rooming houses I met Mr. Marsters one evening in December, I think he said he thought the California and Vernon were selling liquor; I told him those people were complaining that we were searching illegally because the search warrants called for the whole building, that attorneys had advised me to be careful in getting blanket search warrants for the whole building because it was a hotel or rooming house and search warrants must be gotten for specified rooms or I might get into trouble and be sued on my bond. I said I don't feel like taking any more chances unless we could specify the rooms to be searched. I had consulted the former prosecuting attorney, the present prosecuting attorney, Judge Perky, Mr. Cavannah, Mr. Cavaney; I am not sure that Marsters mentioned the Vernon to me; I searched the Union Rooming House in the latter part of October, and found nothing to indicate liquor traffic. Deputy Robinson and Brown assisted and did the searching. There was no federal officer with us on that occasion.

Mr. Kinney is bookkeeper in the Sheriff's office and sometimes does outside work; bookkeeping is his real job.

ON CROSS-EXAMINATION the witness testified as follows:

I also have a bailiff in the courtroom and Smith is

the night watch; I did not mention him because he is not employed by the office, but by the County Commissioners. Robinson is Chief Deputy; I have always been on friendly terms with him; have always had his confidence and have never had any reason for distrusting him; when I am gone he has charge of the office; when I talked to McEvers, I told them to go to Kinney because Colonel Marsters said that when I let Driscoll go I should have let Robinson go, too, that he hadn't much more faith in him than in Driscoll. I had faith in Robinson, but didn't want to subject him to any more criticism; I didn't want Marsters or anyone else to come back and say that anything was being tipped off from the office. I did not say be sure and go to Kinney. I said if they wanted any search warrants while I was gone they could get them from Kinney. I didn't specially single out Kinney for any reason, except that I didn't know where the information was coming from. I didn't tell McEvers to go to any one other than Andy because when Robinson is away Kinney is in charge of the office; that is the only reason I had for telling him that.

I was in Dr. Goodfriend's office twice in December, I don't recall the exact dates; the first time I had been in Dr. Braxtan's office to get advice, as he was the County Physician; he was not in and I went to Dr. Goodfriend's office for that purpose. I had pneumonia about a year before. My side and lungs have bothered me more or less since when I was sick. Dr. Smith was my physician part of the time; Dr. Almond; I didn't ask Dr. Smith about the cod liver oil because it didn't

occur to me; Dr. Smith was not entirely my physician at all times. He had been my physician in this illness part of the time; he made one visit only. Dr. Goodfriend had advised me a time or two about what I should do for my health. He had never called at my house nor had been my family physician; he was not my campaign manager. I gave him a hundred dollars to spend. I felt he had quite a little influence with several different lodges. He is quite a prominent Eagle. He is a member of the Knights of Pythias, and quite intimately acquainted with a number of the Grange and country people. I know Dr. Goodfriend is a physician here.

Q. Yes, you also knew he was a professional gambler, didn't you, Mr. Agnew?

MR. SMEAD: I object to that, your honr, as prejudicial, absolutely an attempt to inject prejudice into this case, and take exception to the District Attorney's remark as untrue and prejudicial and unwarranted.

THE COURT: Overruled.

A. No, sir, I didn't know he was a professional gambler.

Q. Your office had arrested him for gambling at the Whitehouse, hadn't you?

A. We made a raid at the Whitehouse and made several arrests, some twelve or fourteen.

Bud Driscoll did not arrest Dr. Goodfriend. He was present. Mr. Robinson, one of the State Constabulary and myself were there; when we went in the men were seated at a table and we arrested them. Goodfriend pleaded guilty and came up and paid a fine. I don't

know what his reason was for wanting to get Driscoll discharged. Driscoll had nothing to do with the information about the Whitehouse. I didn't tell Driscoll when I discharged him that Dr. Goodfriend insisted on it, or that I was doing it in order to make friends with Dr. Goodfriend. I discussed the Abbott still and other violations of the law with Dr. Goodfriend because Kinney had told me about some information he had given him about the Abbott still and the Stewart still, and had gotten a list of bootleggers which he brought to me; I don't remember that Dr. Goodfriend had given them to him. He never said anything to me about wanting any bootleggers run out of town. Kinney said the fellows on his list were bootlegging; he didn't tell me Goodfriend had given him the lsit that I remember of.

Kinney and I were in Goodfriend's office a few days after election. We had been there together once before election. I never took Andy Robinson to Dr. Goodfriend's office or any other deputy; there was no occasion for it; Mr. Kinney and myself had worked together in the campaign, looking after my interests in the campaign; the other deputies were working hard for me. The object of my first visit to Goodfriend's office in December was to talk about cod liver oil. We talked about the Carl Abbott matter; I had done on that case as any other; I was looking for the location of the still; I didn't know where the still was; I got close on his trail because Kinney told me Goodfriend had told him something about a still; I don't know why Goodfriend thought we had gotten on Abbott's trail, we had been

looking for him, but hadn't his location definitely. I knew I was in the territory somewhere close to him. Dr. Goodfriend didn't call me up on January 4th and tell me where Abbott's still was, he didn't tell me on the 7th that it was in a tunnel at Mayfield. I don't know whether he was particularly anxious for me to catch Abbott or not. I never had much of a conversation with him about it. He had spoken to me about social conditions in Boise during our talks; I don't know whether he was shocked or not at the social conditions; he told me he understood Abbott had gotten scared out and had moved his location and had put his paraphernalia and barrelled stuff into a wagon aud and hitched it on the hind end of his car and hurriedly moved on from the location he was in. I don't know the location; he didn't tell me where it was; I don't remember positively where he told me about the barrels before or after he said we were on his trail; the doctor didn't at that time ask me if I could furnish any barrels; there was no talk about a still except the Abbott still. He didn't say I ought to clean up some of the stills here that I remember of; he didn't mention anybody else's still; he had spoken about this man Stewart's and Abbott's still and the amount of stuff that was coming in. There was nothing said about when it would be better to take them out, day time or night time; I recall nothing that might have sounded like that; the doctor did not say he wanted me to get credit for cleaning up the stills; there was never any talk of that kind that I recall; about cleaning up on anybody particularly; there were very few talks between Dr.

Goodfriend and myself about any matter outside of our political efforts. Dr. Goodfriend never talked with me about the money he had made bootlegging, about a still, setting of mash, when the first run was made, or the amount of money they had on hand, or the amount they would have at the end of the month. After election he said nothing about my running again; the talk about re-election for the coming term was before the election. He said, keep your skirts clean; you might want to run again. I said they had always been that way. In the conversation in Goodfriend's office, during the first part of January, about the arrest at the Union rooms, Goodfriend never mentioned Andy Robinson's name; I don't think he said anything about Mr. Delana; I didn't mention Robinson or Mr. Delana, that I remember. I don't think he did. Goodfriend asked me who the boys were and said he noticed we had the Union again; that was the general substance; I had raided the Union two or three times before; I had made an arrest there before; in October there was nothing found. Mrs. Sorenson, one of the defendants, was running it then; in conversation I told him we had arrested the boys and that they had said where they got this stuff; he asked me if that kind of a case would hold in court; I don't know why he wanted to know; I told him I didn't know wheter it could be used in court; that it would be up to the jury. I didn't say I would find out. I don't remember that Goodfriend said that the boys would testify that they were so drunk that they didn't know who sold it to them; he didn't say that they wouldn't be here when the

trial came up; I didn't say that I would get out and get a special venire and get favorable jurors. There was no talk about money at this time. Dr. Goodfriend did not say that I had $25.00 coming from the Union Rooms again; I didn't say let it go now, I'll get it later, or for him not to let the woman know where the money was going or she would bawl her head off and get me into trouble; I didn't tell Dr. Goodfriend that the Federal men were watching some place; I never made it a practice to tell my business or how we were handling things. I told Dr. Goodfriend I understood someone at the Whitehouse had gotten a letter from Chicago about Stewart and asked him to find out who that party was; I could probably get some information from him. He said he thought Stewart was in Pocatello. I did not say I heard he was in Chicago, and his wife was getting letters from him there; Dr. Goodfriend did not say I would have to let Andy Robinson go; there was never any conversation about my letting him go. Before the election those matters came up. The Ku Klux Klan or several members of the Ku Klux Klan had made demands upon me. Dr. Goodfriend never suggested that I let Robinson go; before election in talking of the hard fight that was being made on me, and demands to let him go, Dr. Goodfriend said for me not to do it; I said I wouldn't unless I had some reason for it. I don't know his reason for wanting to keep him. He didn't say. I didn't tell Goodfriend that I couldn't let him go but would tell him to keep his mouth shut.

In December I mentioned a note to Goodfriend and

that I had to borrow some money. The matter came up again once on one of the dates in January; I wouldn't say positively the date. In December Goodfriend said he would let me have a little money that he had if I needed it. I told him I wouldn't need it; I could have the note renewed if necessary. The note was for $500 at the Boise City National Bank. I had it renewed some time in December. I think I told Goodfriend it was renewed; I don't think I told Goodfriend when it was due; I might have; I said it was good of the bank to renew it for me. Goodfriend never stated to me that Carl was in yesterday and suggested we use the money on hand to pay your note nor that it was good of Carl to offer it, or that he wanted me to know that Carl was a good sport; he didn't tell me that Carl had saved two thousand dollars by using his car; there was nothing said about Carl Sorenson at all or about his car; he didn't tell me to come up often or to come up tomorrow night; I did not go up the next night. I didn't go up until about the middle of January. I am quite sure. He never told me he would find out where Abbott's still was and let me know; I got my information from Kinney. I don't know where he got it. He never mentioned any bonded stuff that Smead wanted. On January 15th I got $25.00 in bills. He did not open a drawer and take out some bills or lay them on the desk and sort them out. I was sitting right near his desk. He was sitting at his desk. I put my hand into this pocket and took out my purse. I never carry my purse in my hip pocket. I said I didn't have the change, told him I would hand it to him later, put my

purse back, put the bills in this book and put it in my pocket; the doctor didn't take a book from his pocket and say the mash was set on December 12th, and that the first run was on the 19th, or by the 19th we ought to be $1500.00 to the good. I don't remember of any talk about Colonel Marsters. Goodfriend never mentioned running me for re-election after election. I don't think he asked me who signed the affidavit for the search warrant for the Vernon or talked with me about the Vernon; I never talked with him about being disappointed that Marsters never let me know they were going to raid the Vernon; I don't remember his saying anything about the affidavit for the Vernon; he spoke to me about an affidavit in connection with the boys that were arrested; if I stated on my direct examination that he asked me who signed the affidavit for the Vernon, that is correct; I said I didn't remember that he did. I don't remember whether that was the time referred to or whether it was about the boys; I don't remember Dr. Goodfriend asking me about the Vernon Rooming house or Mr. Marsters. On direct examination I was confused with the time of the arrest of these two boys; the boys hadn't anything to do with the Vernon that I am aware of.

ON RE-DIRECT EXAMINATION the witness testified as follows:

I looked for the Abbott still, and after the talk about barrels, arrested Carl Abbott on two different occasions; I don't remember when I first remember who Dr. Goodfriend is. I never had more than a passing acquaintance until right after the primaries. It was in the

winter of 1921 and 1922 that I had pneumonia; I never heard Dr. Goodfriend charged with being a professional gambler; I arrested him for playing cards one time in a soft drink place; I don't know whether he was a professional gambler or not; he was there when I went in there. I don't know of his gambling at any other time. There were 12 or 14 people in the room and we arrested the whole bunch.

ON RE-CROSS-EXAMINATION the witness testified as follows:

Following the receipt of information as to where the Abbott still was, we went with the Federal officers to look for it. We had been working together and had been out two or three times; on one occasion I took two of my deputies and two cars and three Federal men; I made arrangements to go out with them at another time where I had heard a still was; I had heard it was in different places. I made arrangements with Mr. Steunenberg to go out again and the officers came to my office; a few days previous I sent Robinson on another raid with them and they brought the stuff and the man in; there had been one or two other cases of Ada County men who had been arrested here, and these men had been sent to other prisons, and I told the boys that I felt that unless I could get these prisoners in the Ada county jail, where I could have a chance to make a little money off of their board, it isn't very much but every little bit helps, and I felt that when we help get these men in Ada County that we should have them here in this jail, and I said, "I don't feel like going outside of my county any more." If that

was a refusal, I refused; I don't know whether that was the day after the raid on the Vernon or not.

It was not my duty to go outside my county to make arrests or look for stills, although I have gone out with the constabulary or the prohibition men. On nearly every occasion I have furnished the cars. I don't know whether the Federal officers had cars or not, but we always used my car.

SYLVESTER KINNEY, a defendant, testified as follows:

My name is Sylvester Kinney, born in Michigan, 45 years old, married, have two boys and two girls, the youngest nine and the oldest 17; have been in Idaho ten years. Business has been in connection with newspapers and periodicals; followed that business in Idaho until 1920; was not employed for 7 or 8 months before I became deputy sheriff; last place I worked on newspaper was on Boise *Statesman* for about 6 years; started as extra proof reader and worked up to night editor.

Became deputy sheriff in March, 1921, under Mr. Agnew; am office deputy, handle all civil papers, see that they are correctly drawn; give instructions as to their execution and make returns when necessary; in criminal matters have charge of the record of prisoner and the books until August or September, 1922; then relinquished charge of that to Mr. Hardin, deputy sheriff; haven't handled the criminal docket since; work day times from 8 to 5, and cometimes we are very busy and other times the work slackens. Handling civil papers is somewhat intricate and a good many things to be considered, making levies, attachments and sales;

a good deal of technical work in that part of my duties.

For practically five years my nervous system has been breaking down, which is the reason I left newspaper work. Sometimes I can't write, my nerves are so shaky. My body trembles at times, too. That condition exists yet. On one occasion I made a search warrant, last August. Justice of the Peace and the United States Attorney was present. I do not direct any raids; the keys to the jail are accessible to the deputies; there is a cell where articles seized and liquor is kept. I have no key to that. I have nothing to do with any search warrant investigations; I never know of a search warrant until it is turned over to me to make a return on it; my knowledge of what is seized is after they bring the stuff in and it is inventoried and a copy given to me. I know Dr. Goodfriend and Mr. Kemp, one of the defendants. The first time I saw Kemp, he was subpoenaed in a case about the first of the year; never talked with him until after he was arrested on the present charge. I had no agreement with him concerning the booze trade. I don't know Defendant Evans; have never talked to him. I know the defendant Carl Sorenson, met him the first time when his wife was arrested on January 10th of this year; I have had no dealings with him since or with his wife. I know Defendant Griffith; just a street acquaintance; never talked to him to amount to much; I know Ed Hill the same way, not intimately. I know Ed Ward, but have just seen him; never talked to him in my life. I have never had any arrangement, combination or agreement concerning liquor traffic with

any defendant. I met Dr. Goodfriend for the first time shortly after the primary election with Carl Norris, and he (Carl Norris) suggested that Goodfriend might be of some assistance to Mr. Agnew in his campaign and I told him I would talk with Goodfriend, and advised me to meet him, and went as far as to call him up, and also said he would take me over and introduce me. He didn't reach him and I didn't go over then; went with Mr. Agnew later on, about ten days after the primary; do not remember the date; went there to discuss political matters; we talked about the different groups of voters, what might be done toward lining them up for Mr. Agnew; discussed it in a general way at the time; Goodfriend said he would support him but he couldn't with that man in his office. He said the man was Bud Driscoll; I saw Dr. Goodfriend on numerous occasions after that; have gone up in the elevator in the Empire Building many times on many different occasions that I didn't go to see Dr. Goodfriend. Have been in there to consult different attorneys at different times about legal papers. I used to get the opinion of two or three different attorneys; I met Dr. Goodfriend on the street when my wife was present one time about October 1st; I had a goiter on my neck; I had consulted other doctors who advised an operation and this worried me a great deal. I met my wife down town and then met Dr. Goodfriend and called him to the car and told him what was the matter and he said to come over and he would look at it. I went to his office and he said he didn't believe an operation was necessary; said he believed he could reduce it or cure it. Thereafter

I took treatment from Doctor Goodfriend three times a week at the beginning and probably twice a week after that up to the present time, since the beginning of October to the present. At the beginning of my acquaintance with Dr. Goodfriend and the subject of liquor traffic and immorality was discussed, and I was deeply interested, having four children; Dr. Goodfriend explained to me that he had contributed something like $1000.00 to the prohibition cause, and of course, there was rather a bond of sympathy in that connection. I had a boy just growing up.

I recall taking Mrs. Sorenson down for a bond at one time. As deputy sheriff, no other deputy being present, the sheriff asked me if I would take her down for a bond. I didn't know who she was at the time. She asked to go to the Vernon rooms and she talked to somebody and then wanted to go to Dr. Goodfriend's office and I took her there. Dr. Goodfriend and Mr. Sorenson were there; there was some conversation about raising some money; that he hadn't the money then and wanted to know if I would take her to her rooms because there was something the matter with her head. I didn't quite understand what was the matter but we went back there and waited for half or three-quarters of an hour and somebody called up and said come over, that they had the bond; so I went back to the doctor's office and Mr. Sorenson and the doctor gave me $500.00 for the bond. At that time it never occurred to me that she was a Federal prisoner. Under a state charge I could have accepted the money and turned her loose if it was a cash bond. I would

not have authority to accept a property bond; then I called up Mr. Jackson, the Commissioner, and wanted to know if she should be present when the bond was delivered to him. He said it would be better, so I took her to the court house and Mr. Jackson came down and fixed up the bond. I have no knowledge of any suggestion that the bond be lowered from $1000.00 to $300.00. I did not intercede with Mr. Jackson about that.

I have no recollection of the dates I was in Goodfriend's office. I have not kept track of that. At different times I have talked over with him matters about the liquor business, getting information about violation; this may have been talked over at the time testified to by Mrs. Curtis. We had certain ones under investigation and we were seeking information. Up to that time Dr. Goodfriend had given me information. The first tangible information was about a man named Stewart. I heard he had a big still and made it my business to try to run down the report; I got information from Dr. Goodfriend; asked him if he would see if he could locate Stewart and he did so approximately, about five miles out; I drove out on a Sunday with my family and saw the name on a mail box; a search warrant was gotten out and the sheriff and two Federal men went out and found the whole thing. They phoned the office and told me that Stewart was in town. I sent Mr. Hardin out to locate him and Mr. Hardin arrested him.

Dr. Goodfriend had told me about Carl Abbott and other parties. He was not positive where Abbott was

but had heard was on the Moutain Home highway somewhere. He gave me other names of persons he thought were handling booze.

(At this point a book marked Defendant's Exhibit 29 and identified as a book from the desk in the Sheriff's office was offered in evidence without objection.)

All the names in the book except the last one refer to men supposed to be violating the liquor law. Dr. Goodfriend furnished all except the last one.

(Names in book read to jury.)

Westerberg, Clark, Swade, Wyckoff, L. Sheldon, Carl Abbott, Black's Creek, Bruce, McLaughlin, Grove Street, Empress, Pulaski, South Boise, Imperial Hotel. He said part of these were hip-pocket bootleggers. He was discussing the relation of this booze with the immorality among the young people of the town. He mentioned the hip pocket bootleggers in that connection; I had no arrangement with Goodfriend to run certain people out of town and leave others here. The only way I could reconcile that to anything that was said by the prosecution that the doctor said that he was going to fix up another place would be that we were talking about that time, about the Abbott layout, I may have said he was moving to a different place, or had gotten to a different place. Explaining what was said about saying to Dr. Goodfriend that there was a place on the Meridian road owned by a young attorney in Richards & Haga's office, the sheriff's office had occasion to look for a boy who had burned up a man's car while attempting to steal gasoline, and we ran it down to a place out here

on the bench that belonged to Mr. Eberle, and in going out there to make our investigation, or rather, the deputies that made the investigation, they found the place vacant, but that there was a lot of barrels of what they call dead mash, mash that wasn't working; I may have said something to Dr. Goodfriend about that, I don't remember anything that was in the house except that I heard the boys say they found old mash there. I didn't ask Dr. Goodfriend what we would have to have to start a new outfit nor anything like that. Dr. Goodfriend didn't tell me they had $270.00 on hand. There was some conversation on one or two occasions about Abbott and the doctor said he brought in 50 gallons last night; at $10.00 a gallon that was $500.00; outside of mentioning one or two occasions large sums of money made by certain people or supposed to have been made in the bootlegging business, we never discussed sums at all in connection with such matters. The doctor didn't say that $15.00 a day would be $4500.00 a month, nor that he would like to rent another place and have me and Carl fix it up. The only Carl I knew of at that time was Carl Abbott; I didn't know Carl Sorenson then; I didn't say I would have Carl go out and see Henry Clee; I did not know Henry Clee at all; the only time I ever heard his name mentioned was once he complained about having money stolen from his house to the sheriff's office; I don't recall saying anything like Jim was rather dissatisfied and thought that all of this could be done in a day; 60 gallons a week was not mentioned to me at all by Dr. Goodfriend. The day Mrs. Sorenson was arrested I

was in Goodfriend's office in the evening about the bond; I did not say the search warrant was no good; they asked me if that warrant was good and I said under the state law it was all right, but that they were very technical about Federal warrants and I didn't know whether it was or not; I don't recall Goodfriend saying that somebody is doublecrossing us. I was rather detached from the group, sitting over in a corner of his outer office; the three of them were more closely grouped and I wasn't paying much attention to the conversation; I didn't follow the doctor to his inner office; he didn't hand me some bills in there; I was not in the inner office at all; I didn't say I would try to get Jackson to put the bond down to $300.00, I had no knowledge of the matter except that the bond was fixed at $500.00; I had no conference with Mr. Jackson in any manner as to the fixing of the bond or the amount. The money was counted out on the table in the doctor's reception room; I didn't hear anybody say "I am going to have the pleasure of fighting this case." I didn't say some of the Klan are after Griffith; I don't know anything about that phase of it; I didn't hear it said that they kicked Briggs off because they thought he was doublecrossing them. If I did, it made no impression on me. I didn't hear Goodfriend say keep quiet nor you needn't be afraid of Jim because Jim is not doublecrossing us; there was no discussion about Jim; when I got the money I called up Mr. Jackson and asked if he wanted her when the bond was given and he said yes. I suggested that Mr. Sorenson go and tell his wife to be ready, that I would have to take her back again.

There was no arrangement that we go out in order or in turn. I don't know of being in the doctor's office on January 26th. I may have been there on the 18th, I don't know. Dr. Goodfriend did not talk to me about a place that would be all right in the summer, that we would have to have one soon; he didn't say that he was afraid of Eddie that I know of; he did not say somebody tipped them off or that we ought to have $1600.00 with what mash we have on hand; there was no conversation relative to mash or money at that time; he did not say we could make $10,000.00 a year; one time he said that he believed there were at least two hundred persons in Boise engaged in the liquor business one way or the other; we frequently discussed Agnew in some way; Agnew and I have acted in harmony at all times; Goodfriend didn't say we would drop Jim after this or that we wouldn't need him any more; the only discussion that I can recall along that line was that there was considerable pressure being brought to bear from a certain organization to get rid of Andy, and I discussed the effect that that might have on Jim's political future; I did not arrange with Goodfriend to advise him of any matters in the sheriff's office, and we have never discussed that except when I have gone to him for information.

I don't know whether I was in Goodfriend's office on January 20th or not; there may have been some talk with reference to reports that were going around that certain people wanted to get rid of Andy; about that time I talked with Goodfriend about a candidate for mayor; several parties asked me if I could suggest any

good candidate for Mayor, and I did suggest Mr. Gibson; I had a conference with a number of different people previous to the time I spoke to Goodfriend; I talked with Mr. Eaton, Mr. Morrow, and Rev. Glendenning, and a number of attorneys, in fact, I talked to quite a number of people. I talked to Mr. Tennyson, Mr. Kessler, Mr. Priest, and Paul Barnes and others. I had not mentioned it to Mr. Gibson himself. My idea was to create a sentiment for him if there was any opposition. I was not doing it to carry out any conspiracy or violate any laws. If I ever said we ought to hurry up it was not in connection with getting any still built. I cannot say definitely whether I was in Goodfriend's office on January 22d, I may have been; on one occasion I was there consulting him about my health and said except that I had three children going to school I would like to have a chicken ranch, that I would sell my equity in my home in Boise. I have a home; that is, there is a mortgage on it. If there was a conversation on the 22d I did not hear the name Tip mentioned; I do not know who Tip is. Never heard the name until it was testified to here. Dr. Goodfriend didn't say he didn't see how we were going to get out to my place; it was too muddy; or that the other place was too close in; I hadn't any place close in at that time; I had a place until last July.

(The deed from the witness and wife to C. E. Marion to a certain property, marked Defendant's Exhibit 30, was handed to the witness.)

That is the property out on the Meridian road; this deed was delivered in July last year; the property was

purchased on a contract and the last payment was made last July.

I had no conversation about anybody's bond except on the night Mrs. Sorenson was arrested; I never tried to get anybody's bond lowered; Goodfriend made no statement that my place was all right in the summer time; nothing ever occurred between us about a place except the time I mentioned going on a chicken ranch; I never talked with Goodfriend about getting better protection for anybody, or about tipping Jim to keep him in good humor. I never tipped Jim Agnew.

Referring to one other conversation that was alleged to have been heard by Paul Reynolds under date of January 8th about Mrs. Kinney getting a job in the State House, I had discussed that with the Commissioner of Public Welfare and told Goodfriend I would like to have him see Donald Whitehead, a representative in the Legislature. He asked me why she wanted the position and I told him that the mortgage on our place was past due and what she earned could go toward the payment of the mortgage. I don't remember whether I told him the amount of the mortgage, it is $1200.00. I don't recall discussing anything else with Dr. Goodfriend at that time.

I have never discussed with Dr. Goodfriend or any other of the defendants going into the liquor business; have never had anything to do with such a thing; I am a temperance man; active member of the Methodist church; contribute to it weekly; I never talked with Goodfriend about affairs in the sheriff's office; he gave me information which was valuable to the sheriff's

office, and in general gossip we had discussed things connected with the office in a political sense. I never took any information from the sheriff's office to Dr. Goodfriend; he never asked me for any; at one time Colonel Marsters said Andy Robinson wasn't any better than Bud Driscoll and he didn't trust him.

ON CROSS-EXAMINATION the witness testified as follows:

I became deputy sheriff March 17, 1921; my wife and I own an equity in a home; we own it subject to a $1200.00 mortgage, have title to it, and have given a mortgage on it. I am what is known as office deputy. I handle the papers in the civil work; when the other officers go out to make arrests I don't know where they are going, it isn't part of my business; I think I have the sheriff's confidence, but it has not been his practice to tell where they are going unless it is to Andy Robinson; either he or Andy get a search warrant, but they never tell me where they are going; the only search warrant I ever knew of in advance was at the time that they went to get Stewart and then I furnished that information myself. I made returns on all the search warrants up to the time Mr. Hardin came in, and then it was his business; I go on shift at eight o'clock and work until five; I never talked with Dr. Goodfriend about Kemp; I believe I saw Sorenson once or twice in Goodfriend's waiting room, but never knew him until his wife was arrested; when I took Mrs. Sorenson to the Vernon rooms to get her bonds she thought her husband was there; then she asked to go to Dr. Goodfriend's office; Sorenson and Dr. Goodfriend were

there discussing the bond; they did not have the money and asked me because of some ailment of her head, asked me to take her back to her rooms and said that they would call just as soon as they could get it; when they called I came over and left her at the Vernon. I don't know who brought her to jail. The sheriff asked me to take her to get her bond. When he asked me to go with her I didn't know who she was or anything about the case or the amount of the bond; when I went to the office it showed on the commitment. I left her at the Vernon while I went to the office of Dr. Goodfriend to get the bond money; I didn't think I was turning her loose; they phoned and said they had the money, and I didn't think I was betraying any trust by going over to get it; at that time it didn't occur to me that she was a Federal prisoner; if she had been a state prisoner I would have gone and got the money and that would have been all there was to it; that sort of thing had not been my habit because it had not been my duty to do those things; as a matter of fact I knew she was a Federal prisoner but it didn't occur to me that it might not be regular according to the Federal law, and that is why I called up Mr. Jackson and asked him if he required her presence when he got this bond money; when I left her at the Vernon rooms I had information that they had the money; it was apparently guaranteed by Goodfriend and I took his word for it; it was sufficient; she was a stranger to me at that time. I got the money and called Jackson and then went and got her.

I first met Goodfriend after the primary election and

talked political matters with him; it was agreed that he would support Agnew in the general election and did so far as I know; there was no talk about being able to control the Main street vote; we talked about the different groups and he didn't say anything about controlling any votes; he advised how we might influence some votes, but not the Main Street votes at all; he did not refer to that in particular; that was the time he said he would support Agnew if he got rid of Driscoll; the only conversation in connection with Bud Driscoll was that Goodfriend felt hurt about something that Driscoll had done. I don't know who engineered the raid on the Whitehouse or who was running it at that time; there seemed to be personal enmity between Dr. Goodfriend and Driscoll. Goodfriend had said if Agnew would get rid of him he would support him, but couldn't support Agnew with Driscoll in his office. I saw Goodfriend on many occasions after that, We discussed things quite frequently. I have been in the Empire Building very frequently, a number of times to get the opinion of various lawyers; I didn't go to the prosecuting attorney because he was very busy. I don't know if we ever considered him the legal adviser of our office. I was just following out a custom that George Chapman had established when he was in our office. He advised me when I got into a difficult situation to advise with certain lawyers, Mr. Wyman, Mr. Barber, and different attorneys. Wyman and Barber do not have offices in the Empire Building. I have consulted Hartson, Gibson, Boom, and I went there because I felt like going to them; I don't know

when I discussed the liquor problem first with Dr. Goodfriend; he said he had contributed $1000.00 to the prohibition cause; he was very insistent upon cleaning up the moral conditions in this city. He was much interested in cleaning up the liquor and immorality among the young people; he always has insisted on that when we have discussed it. He has told me of different places he had heard of where the liquor laws had been violated. He never mentioned the Vernon rooms or any other rooming house.

Q. Did he ever tell you that a fellow by the name of Ed Kemp or anybody else was manufacturing whiskey close to his place out by the Whitney school?

A. No.

MR. SMEAD: That is objected to as argumentative and assuming something not in the record.

THE COURT: Overruled.

MR. SMEAD: Note an exception. It is an attempt to prejudice the jury.

Q. Did he ever give you that information?

A. No, sir.

The only time we ever discussed any ranch on the Meridian road was when I told Goodfriend that the boys had found a lot of dead mash on Eberle's place; I mentioned Mr. Eberle's name; I didn't know whether he belonged in Richards & Haga's office. I don't remember mentioning the Day Realty Company as having the leasing of that place; I had a talk with Mr. Eberle about the leasing of the place. I didn't want to lease it; Mr. Eberle wanted to know if I knew anybody who wanted to lease it. Mr. Eberle broached

that conversation; his testimony was incorrect about my broaching it to him; because I know of no one who wanted to rent a place. I met him in front of the courthouse and was joshing him about running a still on his place; we talked back and forth and he laughed; just before he left he said, "You don't know of anybody that wants to rent or buy that place?" and I told him no, I did not.

When Agnew and Robinson were both out of town I was in charge of the office. I have nothing to do with the criminal matters of the sheriff's office. Goodfriend and I talked about Abbott's still. He told me at one time that his best information was that it was 13 miles out on the Mountain Home highway, or off the Mountain Home Highway. I think Goodfriend was interested in the Abbott still because he was insistent on getting all of the bootleggers. I don't know that we ever discussed the rooming houses at all. We were talking of manufacturing, bootleggers and moonshine. We never mentioned Ed Kemp. He probably has mentioned a half dozen or eight or nine to me.

When I was in Goodfriend's office on January 10th, I wasn't advising them at all. Very frequently prisoners tell us their troubles and in this particular matter they asked me if the search warrant was all right that was made out for 202 and 207, and there wasn't any such room; I said under the state law it was good, but I didn't know under the Federal law. That was when I first went in; somebody had a copy of the search warrant, I don't know who; I wasn't in the doctor's inner office that evening; the money was counted out

to me on the table in the reception room; when the witnesses said they saw me in the inner office, they made a mistake; they never saw me in there at all; I don't know whether Goodfriend called up Mr. Smead about the search warrant; I wasn't paying any attention to any conferences that were had; I may have been there five or ten minutes all together. I don't know exactly.

I don't own the property in the Syringa Park addition any more. Two years ago I purchased forty acres of sage brush in the desert. I haven't seen it since I purchased it; there is a mortgage on it which I gave the man I purchased from. He comes in here once a year and collects his interest, and I don't know where his postoffice address is. He or some of his relatives live around Meridian. I don't just recall his name. I could probably think of it after a little. The property is about 16 miles out of town. The roads are very good so far as I know to Pleasant Valley, from Pleasant Valley on there is about a mile of road that I don't know what condition it is in; I haven't been out there since I purchased it two years ago last October. It isn't in the valley at all; it is right out in the desert; there is no improvement out there, no water or anything. It is just sagebrush land.

It was reported to me some time in November or December that the Klan was after Andy Robinson and were going to get Jin imto trouble if he didn't let him go; it isn't a fact that I have been trying to get Andy out of there; I did not tell Tom Powell, Clerk of the Court, that Andy Robinson had been taking stuff out

of the jail and that I wanted him to help me get him; I have never seen a thing wrong with Andy Robinson or any other deputy in that office. I did not try to get Frank Leavitt to help me get Andy Robinson discharged on February 9th. About that time I was discussing with him what the Klan was doing, and he told me that the Klan had gotten information that Dr. Goodfriend, Chief of Police Griffith and Jim Agnew had divided $3000.00 among them; this was so preposterous to me that I never even mentioned it to Mr. Agnew at this time we were talking about Andy Robinson.

I spoke to Goodfriend about running Gibson for Mayor. We never talked about him as a reform candidate. I didn't have any conversation with McKeen Morrow as he stated it. I had a conversation with him and with numerous others and I don't believe there is one other that will verify what Mr. Morrow said. He evidently misunderstood what I said because there was no mention about the cooperation between Jim Agnew and myself and the police, because it isn't any of my business whether the sheriff and the police cooperate or not; the conversation Mr. Morrow related was made to fit in with the rest of the testimony put into this case; I believe it was made specially for that purpose. I don't know whether there was any conversation on the 22d in Goodfriend's office or not; it was the time we were talking about chickens, then I talked about an equity that I had in my place here in town. I have charge of giving sheriff's deeds; have probably made out a dozen or fifteen sheriff's deeds since I have been in office; if I were to refer to selling

a piece of mortgaged property I would refer to selling my equity; I couldn't sell the mortgage or I couldn't sell the interest of the mortgagee in the property. I don't know that I know the difference between one who holds title to property and one who holds an equity in it.

JOHN JACKSON, a witness for defendants, testified as follows:

I am United States Commissioner; I remember the time Mrs. Sorenson's bond was fixed. I fixed it; Mr. Kinney had nothing to do with it. He didn't discuss the fixing of the bond with me or lowering it from $1000.00 to $300.00 or compromise to make it $500.00.

ON CROSS-EXAMINATION the witness testified as follows:

There was some discussion as to the bond in Mrs. Sorenson's presence when she was brought before me.

RE-DIRECT EXAMINATION:

The discussion was between myself and the prohibition officers and Mrs. Sorenson. Mr. Kinney was not present. I think Mrs. Sorenson asked what her bond would be. I said I didn't know until I discussed it with the prohibition officers to get some of the facts in the case; I always do that in order to determine about the nature of the case. I think I did tell her that ordinarily in cases of that character I had required a thousand dollar bond; she said she couldn't furnish a bond of that size, and after talking with some of the officers I told her I would fix her bond at $500.00. I am not sure that the officers asked that the bond be fixed at $1000.00 or not.

HENRY HAMMING, a witness on behalf of defendants, testified as follows:

(A certain plat marked Defendant's Exhibit 31 was identified by this witness as a correct floor diagram of the two office rooms of the defendant Goodfriend in the Empire building, also that the plat showed the location of the table and chairs and other articles placed on the floor of the room, location of the doors and windows and that the entire diagram was accurately drawn to scale as to objects thereon shown. The diagram was admitted in evidence.)

HENRY GRIFFITH, a defendant, testified as follows:

Name, Henry Griffith; residence Boise, for 17 or 18 years; have family consisting of a wife, a boy and a girl. Have been police officer for 16 years continuously, Captain and patrolman, and am now Chief of Police; appointed June, 1922, by Mayor Sherman. I was Chief of Police during December, 1922, and January, 1923; do not know Marie Curtis; know the defendants when I see them, and have known Dr. Goodfriend several years by sight. I know Defendant Ward; do not know Defendant Evans; I know Edith and Carl Sorenson and Ed Kemp by sight.

I was in Goodfriend's office on December 29th, 1922. He called me on the 'phone and I went to his office. I don't remember the time of day. I asked him what he wanted. He said Ed Hill was getting after his gambling game or something to that effect, at the little place in the Pacific Hotel; and I told him if he was gambling I would have to get him; he gave

me a cigar and we sat there and talked a few minutes. Nobody was present except Goodfriend and myself. We were in his inner office close to his desk; I think I sat down; I don't remember walking around the room at all. I had never been in his office before.

Since I have been Chief of Police I have made between 35 and 40 liquor raids; have cooperated with the Federal men at all times. Have never refused to cooperate and have gone with them on several searches and raids; I have procured warrants for them and have never refused to procure warrants for them; I have furnished information upon which they obtained liquor and made raids several times.

The conversation with Dr. Goodfriend said Ed Hill was going to kick in the door or something if gambling or card playing continued in the back room. The back room is assumed to be the gambling place. I never heard of any liquor being disposed of or sold there. As to the statement that I said I couldn't guarantee anything; that he would have to have the lights out by 12 o'clock because if he didn't people would see the lights and kick about keeping open after 12. I made some of it. I mentioned something about stool pigeons. I asked him if when they played cards in there they had any money on the table and he said no. He said they locked the door. Ed Hill said the door was locked. I told him if the door continued to be locked I would have to put a stool pigeon in there and catch him. He said nobody ever played in there excepting a few friends it was a private office in the Pacific Hotel; I said that Colonel Marsters had told me that they were hand-

ling whiskey at the Scotch Woolen Mills and told him not to tell anybody because it would get me in bad with Colonel Marsters. He said I was doing well; we hadn't had any burglaries this winter. He asked me if we had made any raids. I said I didn't want to betray Mr. Marsters and told him not to say anything about the Scotch Woolen Mills. He didn't tell me I would have to get rid of a certain man on the police force. He was not running my business; I don't remember of his saying that any man was doublecrossing them; nothing was said about running Pete for Mayor or running anybody else; I never told Goodfriend at any time that anybody was doublecrossing me. I was next in Goodfriend's office on February 11th. Our former city attorney told me that I was going to be indicted for something that happened in Goodfriend's office and I called Goodfriend the next day and went down to find out what I had done. I was interested. I went up and asked him if he knew anything about it; he didn't seem to know much about it but said that some people who had been running a rooming house had been talking or something; he called up the Sorensons and they came up there; I was not present at the conversation; they were in his private room; they went out into the hall and I went out there and asked if any of my men had ever got any money; that is all that occurred; I told him they always did their duty when I was or was not there; I wouldn't guarantee anything. Captain Stoops has charge of the rooming houses in the city. I don't have anything particularly to do with that line of work; Stoops and his two detectives are on night

shift; Nicholson and Hill. I go home at six o'clock and very seldom come back after supper. Captain Stoops takes charge when I am not there. He is assitant chief. I went to the Vernon Hotel on February 7th with Captain Stoops; they made all the rooming houses in town that night just to see how conditions were. I saw Mrs. Sorenson at the Vernon rooms and jacked her up for having a buzzer put in there; asked her if she had that there to tip her off when we came. I heard the testimony about Nichols and Stoops making that statement; I made it myself. I know Mr. Kuchenbecker. Have not known him long. I heard his testimony on the witness stand about hearing my conversation in Goodfriend's office on December 29, 1922; I have related all the conversation I had about that time; I know H. R. Briggs; he was a patrolman.

(Paper marked Defendants' Exhibit 32 submitted to witness and admitted in evidence.)

That is a letter from the Mayor to me; I talked to him about that letter. He said we had one too many policemen and to dismiss the poorest man. I dismissed Briggs on his record as a police officer. He never made any arrests; wouldn't go into an alley at night; never made any arrests for drunkenness. I employed Mr. Webb; he was working with Dr. Almond to clean up the town of venereal diseases; I told him if he found booze to tip me off, in any rooming house; he told me about the Vernon, California, Ada and the Dance Palace; I made a report to the prohibition office in regard to the Vernon and the other places; I never refused to raid any rooming house which was handling liquor;

I never conspired or had it in my possession; nothing was ever mentioned between Goodfriend and myself about booze; I never had any connection with any of the defendants in this action concerning intoxicating liquor; I have never used intoxicating liquors; I went to the United States Attorney's office February 12th and offered to appear before the Grand Jury; he would not let me do so; I told him at that time I wanted to tell everything I knew.

About January 1, 1923, Mr. Steunenberg came and wanted me to search two places; I went with him; we searched the Oregon Rooming house and Kimzey's place; Kimzey was arrested; we found nothing at the Oregon Rooms; I don't remember saying that I couldn't go on any other raids on that occasion; it was the custom of the prohibition officers to have me get a warrant and tell me where they wanted to go; they come to me when they haven't evidence enough to get their own search warrants and want to get them from me; I think they have to have more evidence to get a Federal warrant; I have never refused them; I don't think any prohibition officers said anything on January 1st concerning Kemp's place on Idaho street; I know Kemp when I see him; did not know he had a place on Idaho street; I never directed any of my men not to raid any rooming houses; I told them all when they found any suspicious circumstances to get a warrant and go after them; the Union Rooms was searched in November; Mrs. Goldsbury was operating it; she was arrested; liquor was found there; I told Mr. Steunenberg the prohibition officer, that they were selling liquor at the

Vernon rooms; that was about the time it was raided.

Ed Hill has been patrolman off and on for six or eight years, he is a defendant; he was patrolman and then detective. I have found him a very efficient officer; never had reason to believe that he was trying to protect any house or person. I often verified his reports and found them about the way he reported; I never had any knowledge of any conspiracy as charged in this indictment in regard to possessing or sale or manufacturing liquor. I never knew Ed Kemp was in charge of a still until it was discovered; Hill and Nicholson raided the Union Rooms and arrested Mrs. Goldsberry, the witness who appeared for the Government.

It was in January that he and Captain Stoops visited the Vernon Hotel. We were looking to see if there were any girls there; she said she did not have any and we looked at the register; we never had any complaint about any girls being there.

I do not mean to say Dr. Goodfriend said that Jap's place was his place; he said he played there once in a while, I believe; he said it was a friendly game; he said if Hill ever broke in the door he hoped he wouldn't be there.

ON CROSS-EXAMINATION the witness testified as follows:

I don't know what the doctor meant when he said he wouldn't be there.

Q. Now, Mr. Griffith, before going over to Dr. Goodfriend's office on the 29th of December, you knew his reputation, did you not?

MR. CAVANEY: That is objected to as incompetent, irrelevant and immaterial.

MR. DAVIS: I will change the form.

Q. You knew he was a professional gambler, didn't you?

MR. CAVANEY: We take exception to the United States Attorney—

MR. SMEAD: If the Court please, I object to the question, and take exception to the statement as highly prejudicial. Counsel is simply attempting to do indirectly here, and in an underhanded way, what he knows he can't do directly. He is attempting to prejudice the case of the defendant by attacking his reputation. He knows he can't do it directly, but he is endeavoring to do it here by inference and insinuation and innuendo, and I take exception to it and cite it as prejudicial to this defendant before this jury.

THE COURT: The jury will not consider any statement of this kind as against Dr. Goodfriend. They will consider it only as bearing upon the attitude of mind of the witness defendant and as throwing some light upon his conduct and motives. They will not consider it as against Dr. Goodfriend.

MR. SMEAD: Is the objection overruled, your honor?

THE COURT: Yes.

MR. SMEAD: I take exception to the overruling.

Q. (MR. DAVIS): You knew, did you not, before you went to Dr. Goodfriend's office on the 29th of December, that Dr. Goodfriend was a professional gambler?

A. I don't know whether you would call him a professional or not. I have heard he gambled.

A. And you knew he was gambling in this town in violation of law, did you not?

A. No, sir, I knew he was playing cards, but I never could catch him at it.

Q. You have tried to catch him, have you?

A. Yes.

MR. SMEAD: I move to strike out that testimony. It can't be anything more than a statement of opinion of this witness, and he says he doesn't know anything about it, and it is highly prejudical.

THE COURT: Again I say the motion will be denied.

MR. SMEAD: I take exception.

THE COURT: With the instruction to the jury again that this is merely for the purpose of throwing light upon the mental attitude of this witness, and possibly throwing some light upon his conduct and the motives which may have actuated him in doing what he did do, but will not consider it as tending to incriminate Dr. Goodfriend.

I did not know before going there what he wanted; I had not been there before; I thought a Chief of Police could go anywhere he wanted to. As Chief of Police I didn't tell him he should come to my office because I thought a Chief of Police had a perfect right to go any place; once before he gave us information about a fellow who got shot; I had plenty of time and I strolled up there. I went to his office on February 11th because I was told I was to be indicted because of something that happened in Goodfriend's office and I went up there to find out what wrong thing I had

done; they said it took place there, whatever it was. I thought about going to the district attorney's office to find out, and I went to my attorney and he told me to go; this was after I went to Goodfriend's office on Sunday. Goodfriend said he thought the woman that ran the Vernon rooming house had been saying things and told him to call her up and see what was the matter; to see if any of my men had taken any money, or if there was anything to it; he called her, they came over and we had a conversation there; that conversation happened as Mrs. Curtis said except I went out in the hall and asked if any of my men took any money from them; on February 11th I don't know how long I was at his office. On December 29th at his office Goodfriend said Hill had been monkeying around Jap's place and he was going to kick the door in; I know Goodfriend was playing cards there; he wanted me to keep Hill away from there. I said I wouldn't guarantee what my men would do, if he was gambling in there I wanted my men to get him and I instructed my men to get him; I don't remember him saying anything about Officer Briggs; that I had better get rid of Briggs; I don't know what date I discharged Briggs but I know Goodfriend didn't have anything to do with it; I couldn't help what he said. I didn't tell the doctor that my men wouldn't go unless I sent them; my men got warrants whenever they got ready. I was hardly ever with them when they made raids; I don't remember him saying anything about Jim; I told him if he didn't quit gambling I would put a couple of stool pigeons in the game and catch him; he might

have said if I put stool pigeons in he would know them; he said they played in there among themselves; I don't know how I would get them in; on that occasion I told him about the raid on the Scotch Woolen Mills; he asked me if I had made any raids and I told him about the Scotch Woolen Mills and about Colonel Marsters, and not telling anything about it; if Colonel Marsters got hold of it I don't suppose he would want it known that he had tipped them. The Federal authorities come down and had me raid the Idan-ha one night, and didn't even go with me; they slipped around the other way; I didn't talk politics with Dr. Goodfriend that afternoon; I don't know whether he told me to stay out of politics or not; I don't think he said we would have to run Pete for Mayor, I don't think there was any talk about who was to run for Mayor. I wouldn't say for sure; I don't know all that he did say; I don't think he said I should stay out of politics because he would be able to take care of me. When I went to the district attorney's office, I went voluntarily; what I said was said voluntarily; I came to try to go before the Grand Jury; Goodfriend tried to get me to stay away from the gambling place, me and my officers; I made no arrangement with him at all; I told him and told my men after that to go and get him at any time they could get him. I never said to the district attorney that if I had taken any money from Dr. Goodfriend it had been for gambling and not for liquor.

On January 1st I got two warrants for the prohibition officers. I don't remember them saying anything about Ed Kemp's place.

ON RE-DIRECT EXAMINATION the witness testified as follows:

In November and December, 1922, I didn't wear my uniform. I haven't worn it this fall or winter at all; I never did wear it at night. I have never worn it to Dr. Goodfriend's office; I never went to his office in the evening. I never had a uniform on which the word "Chief" was written on the buttons.

On my first visit Dr. Goodfriend said the boys played cards in there, but did not have any money on the table; I told him the door was locked and they would have to open the door to let people in there to see so there wouldn't be any suspicion about it. He said he didn't want me bothering them, and said if there was going to be any trouble he would stay away from there; he said if Hill kicked in the door he would be four miles away from there.

EUGENE B. SHERMAN, a witness for defendants, testified as follows:

Name, Eugene B. Sherman, Mayor of Boise City.

Henry Griffith was Chief of Police since the summer of 1922, and is at the present time.

I sent the letter, Exhibit 32, to the Chief, and we had a discussion about the police department at that time. I talked with him tiwce, about the middle of December once, and I told him the expense of the police department would exceed the amount allowed it for the budget, and suggested that he decrease the police force one man; the force had one more man than had been allowed in the budget. On December 26th he had not yet signified his intention of dropping

a man, and I wrote him that letter. He came in immediately and asked me whom we should drop. I told him that he was Chief, but I felt he ought to drop the poorest man on the force. On the same day he said Briggs was the poorest man on the force; showed me the man's record of arrests, reminded me of certain things that I had known, and stated in his opinion Briggs was the poorest. I told him I agreed with him and he should certainly relieve Mr. Briggs before the first of the month, and that was done; I confer with the Chief of Police every day; have reports every morning and drop into the station probably once a day and three or four evenings every week.

The police department is under my control as the head of the department of public affairs. I get daily reports on the conduct of the police officers; Ernest Stoops is head of the detective force; he is also assistant chief. He is the immediate superior officer of Defendant Ed Hill.

I know of no instance and have had no information that Ed Hill has tried to protect any rooming house or persons violating the liquor law.

ON CROSS-EXAMINATION the witness testified as follows:

There was no one appointed to take Briggs' place; the man who had previously been employed as resident patrolman was transferred to the beat which had been covered by Briggs.

ERNEST A. STOOPS testified as follows:

Name, Ernest Stoops, Captain of Detectives in Boise City for about a year and a half.

Q. (MR. CAVANEY): Did you ever have any instructions from the Chief of Police to lay off on any rooming houses or other places in Boise City?

MR. DAVIS: Objected to as incompetent and immaterial.

THE COURT: Sustained, unless there was some testimony to that effect. I don't recall that there was.

MR. MARTIN: The whole case of this conspiracy shows that Chief Griffith and Ed Hill were protecting the Vernon and the Union Rooms, as their part of it.

MR. SMEAD: And there is specific testimony, your honor, that somebody claims to have heard in Dr. Goodfriend's office the statement that Ed Hill was to keep Stoops and Nichols away from I don't remember it was the Union or the Vernon.

MR. DAVIS: Mrs. Sorenson said there that she was paying Hill to keep them away.

MR. MARTIN: But you put it in.

THE COURT: I can't see that this would have anything to do with that.

MR. CAVANEY: This is the man in charge of that department. That is his business and his duties as an officer.

THE COURT: Suppose that one of his subordinates was disloyal.

MR. CAVANEY: We can't assume that. We want to show what the instructions were from the Chief.

THE COURT: The fact that he gave proper instructions would not raise any other presumption than already exists.

MR. CAVANEY: But this man is in supervision of this department, and he would know whether or not his men were following out his directions.

THE COURT: The objection is sustained.

MR. CAVANEY: Note an exception.

Q. (MR. CAVANEY): During the time that you have been captain of detectives has Chief Griffith ever at any time or at all stated to you not to enforce any of the laws of Boise City or any of the liquor laws.

MR. DAVIS: That is objected to as incompetent and immaterial.

THE COURT: Sustained.

MR. CAVANEY: Note an exception.

Q. (MR. CAVANEY): Did you have any instructions from your chief to do anything than to perform your official duties?

MR. DAVIS: Objected to as incompetent and immaterial.

THE COURT: Sustained. I am sustaining these objections on the assumption now that there has been no evidence to the effect that he instructed this man not to enforce the law.

MR. CAVANEY: But there is an inference, if your honor please, if it is not direct and positive, that the police department was giving protection to certain rooming houses in this town, and the very gravamen of this offense, so far as Captain Hill and Chief Griffith are concerned, is that the police department were protecting the Union and the Vernon rooms. I believe it is competent for us to show by these officers that they never received any such instructions from the

Chief or anybody else to do any such thing. That is the only inference that I desire to cover with these witnesses, that that is not true.

THE COURT: What isn't true?

MR. CAVANEY: That those places were given protection at any time by the police department or any officer of the police department.

THE COURT: That would necessitate calling all of the police force.

MR. CAVANEY: Yes, sir, if your honor please.

THE COURT: The objection will be sustained.

MR. CAVANEY: Note an exception. I would like to make the following offer in the record.

THE COURT: No. Ask him the questions.

MR. CAVANEY: There is no need of asking this witness any further questions, that I can see. That is all.

I am Captain of Detectives. Defendant Ed Hill is under my immediate jurisdiction, has been for about a year; before that I worked with him as a patrolman when I was day captain. He never said anything to me as to whether or not I should pay attention to the Vernon rooming house or the Union rooming house; I never had any reason to believe that Mr. Hill was in any way trying to protect the Vernon rooming house or the Union rooming house; some time in November Chief Griffiths, Ed Hill and Nicholson raided the Union rooms.

(Defendants' Exhibit 33 marked, being official police record of the raid referred to, admitted in evidence; read into the record.)

I don't think the Chief wore his uniform in November and December, 1922; for quite a long time he hasn't worn a uniform at all.

(At this time it was stipulated that all police officials would, if called, testify that they had not been instructed by Chief Griffiths to protect any rooming houses in Boise; particularly the Vernon and Union rooming houses; and further stipulated that Mr. Nicholson, if called, would testify that Mr. Hill never asked him to keep away or tried to any way prevent him from examining them.)

ELBERT S. DELANA, a witness for defendants, testified as follows:

My office is on the sixth floor of the Empire Building; Dr. Goodfriend's office is in the same building on the next floor below. I know Ed Hill, City Detective. During the fall of 1922 Mr. Hill came to my office at least three times in the evening during a criminal trial in the state court; he was a witness for the state in that case; the trial began on November 27th and lasted a week and a half or two weeks; I was then prosecuting attorney for Ada County.

Chief Griffith was with Mr. Hill on some occasions; I don't know how many; I don't remember whether he wore his uniform or not.

HARRY S. BRIGGS, a witness for the defendants, testified as follows:

I have been on the police force of Boise City off and on since 1911 or 1912. I have worked with Ed Hill during that time both as patrolman and plain clothes man; sometimes on the same beat with him; I never

saw or knew anything to cause me to believe Mr. Hill was protecting any rooming house or person in the sale of liquor.

ED HILL, a defendant, testified as follows:

Name, Ed Hill, one of the defendants; 42 years old; born in Boise Valley; have been in Idaho all my life, but about nine years. I lived in Boise County, moved there when I was about 9 years old. My father was a farmer; from there I went to Wallace, Idaho, mining; lived in Montana for about 7 years; was deputy sheriff at Missoula and City Marshal for Saltez and Taft; I went to Edmonton, Canada, for about a year; was police officer there; came back to Boise. Five years I have worked on the police force in Boise, and I went on the police force again two years ago.

I have been city detective since June 1, 1922, hours four to one, sometimes later. I am married and have two daughters.

I know some of the defendants better than others; have met Goodfriend two or three times, Kinney two or three times; know Sheriff Agnew quite well, know Ed Ward and Ed Kemp by sight. I know Mrs. Sorenson slightly; do not know Defendant Evans; have never entered into any arrangement or understanding to have possession of liquor of any kind to sell it or manufacture it; I have no knowledge of any of the defendants at any time possessing liquor, sold it or manufactured it. I never had any arrangement to protect the Union or Vernon rooms in any way or any other rooming house or person. I never received any money from Sorensons or any other person for protec-

tion or otherwise as an officer. I never tried to protect the Union rooming house, Vernon rooming house or any other; I was at Dr. Goodfriend's office once six or seven years ago; have not been there since that time.

Dr. Goodfriend never at any time told me to lay off his friends or he would get my job. I never laid off his friends or anybody else's.

JOHN JACKSON, recalled as a witness for defendants, testified as follows:

Q. I hand you—

MR. SMEAD: I will say to your honor this is a Court file, there is only one piece of it I want. They are stapled together, I wouldn't like to disturb them without the Court's consent; there is only one sheet I care to have. Shall I separate them or have the whole file—

THE COURT: What is it, an original file?

MR. SMEAD: An original file, yes, and an original affidavit.

THE COURT: It needn't be separated. You can read into the record what is material.

Q. (MR. SMEAD): I hand you a Court file, Mr. Jackson, calling your attention to the last document (witness handed papers) in the file, the last page in the file; state what that is, please?

A. An affidavit for search warrant.

Q. Before whom was that affidavit taken?

A. Before me.

Q. You are United States Commissioner at this point, I believe?

A. Yes, sir.

Q. That is an affidavit for a search warrant, is it not?

A. Yes, sir.

Q. I hand you—

MR. SMEAD: I will have this marked, please.

(Whereupon a certain paper was marked Defendants' Exhibit 34. Said Exhibit 34, offered by defendants, consisted of an affidavit for search warrant by the witness Paul Reynolds, the search warrant issued thereon, and the return attached thereto; said affidavit stated in substance, and said warrant related pursuant to said affidavit, that the said Paul Reynolds had been informed by reliable parties well known to him, that said parties had seen several automobiles go to and from said house at divers times of the day and night, the lights on said automobiles being extinguished before approaching said house, and said lights not being turned on again until said automobiles had proceeded some distance away from said house; that the said informant had also gone on said premises and had seen a dim light in one of the rooms of said house, and could detect an odor of mash and whiskey on said premises. That the said affiant, Paul Reynolds, had also been informed by other parties that they had seen certain persons hauling barrels and other equipment such as is used in the manufacture of intoxicating liquors to said premises.

The foregoing being all of the allegations of said affiant and said warrant touching on information of the affiant, the said Paul Reynolds, upon the strength of which said search warrant was asked and issued.)

Q. (MR. SMEAD): I have had this marked as

Exhibit 34. Now, Mr. Jackson, I will hand you another exhibit marked 13, and call your attention to the last document that appears in that respect and ask you what that is?

MR. McEVERS: Objected to on the ground that the exhibit speaks for itself, it is a record of this Court.

Q. (THE COURT): What is it, Mr. Jackson?

A. Affidavit for search warrant.

Q. (MR. SMEAD): Taken before you?

A. Yes, sir.

Q. By whom were these two affidavits made, Mr. Jackson?

THE COURT: No, you needn't answer that, they show for themselves.

MR. SMEAD: Well, there is a signature here. That may be assumed to be the one. I want to identify it further.

THE COURT: I suppose counsel will admit that.

MR. SMEAD: I assume. It is verified by the Commissioner's seal, your honor. There is probably no question about it.

MR. McEVERS: We introduced one of them.

MR. SMEAD: I offer on the part of the defense that portion of the affidavit, Exhibit 13, the affidavit to which I have called the witness' attention, and that portion of Exhibit 34, the affidavit to which I have called the witness's attention. (Hands paper to Mr. Davis and Mr. McEvers.) I offer these, your honor, as showing on their face the—as showing on their face that the information which led to both of these searches was not obtained in the manner which it has—if it

hasn't been testified to directly, has been introduced by inference into this record and will be no doubt argued by the government. Each affidavit.

MR. DAVIS: Objected to as incompetent, immaterial, not showing anything whatever, and not tending to prove or disprove any matter in issue in this case.

MR. SMEAD: Presumably, your honor, the affidavit for search warrants being a sworn statement made in a judicial proceeding, states the truth. In each case these affidavits were made by a witness who has already been on the witness stand in this case for the government, and if the affidavits be taken as true, they show directly that the information leading to the searches was not obtained in the way by which might be by the prosecution's case—

THE COURT: The only purpose I can see of the other would be to impeach the witness.

MR. SMEAD: Sir?

THE COURT: Impeach.

MR. SMEAD: No, sir, not necessarily to impeach the testimony, but to rebut the inference at least which the prosecution's witness has left.

MR. DAVIS: I understand to impeach that inference.

THE COURT: You offer it in evidence for impeachment purposes or not?

MR. SMEAD: I can't, your honor. I believe I was not permitted to go very far with the witness who made these. I offer them, yes, for impeachment of that witness.

THE COURT: You didn't show them to him?

MR. SMEAD: I asked about the search warrant and wasn't permitted to.

THE COURT: I think you asked him about it—

MR. SMEAD: Your honor will recall I asked him about making an affidavit in each of these cases and asked him if the matter which was stated in the affidavit was true, and your honor sustained an objection.

THE COURT: Yes, but the affidavit wasn't shown him.

MR. SMEAD: I don't know this particular one of these affidavits.

THE COURT: Was he here when the affidavit was used?

MR. SMEAD: I think when—I don't offer them on the theory of impeachment particularly. I offer them on this theory that the prosecution's case shows, ostensibly at least, that there was a cooperation, a community of operations in the office of the prohibition director in this city in connection with the case which is now on trial, and it is open to inference and will be argued that the evidence, the information rather, which led to the search of the Vernon Hotel and the subsequent later search of the Evans place and the arrest of Ed Kemp was obtained by these witnesses who claim to have heard the things in Dr. Goodfriend's office. I offer these as records of judicial proceedings to show that such isn't the case. I think they are the best evidence. The affidavit is the original record in each of those cases, the very first record that is made, and shows on its face that the information was not so ob-

tained, and the search warrant wasn't issued on information which it is now claimed was gotten through Goodfriend's office. I think they are competent as any other judicial record is competent for that purpose, to prove the facts that appear on its face.

THE COURT: Objection sustained.

MR. SMEAD: Note an exception.

MR. SMEAD: That is all, Mr. Jackson.

J. R. SMEAD, witness for defendants, testified as follows:

Attorney at law, Boise, Idaho; I am the party whose name has been mentioned a number of times in the course of this trial; have known Dr. Goodfriend ten or twelve years. For the past three months my office has been on the same floor of the Empire Building as Dr. Goodfriend's office, directly west, about 35 or 40 feet. The conversation related by one of the witnesses for the prosecution that I had with Dr. Goodfriend in which it was claimed I was overheard conversing relative to the Ku Klux Klan did not occur as the witness stated; I don't know of any similar conversation unless it was in his office that he told me of an Anti-Ku Klux Klan organization; I don't know whether that was in his office or in front of the building, but that was the only conversation I ever had with him on that point. It was never stated by either of us in such conversation that the organization was to be effected to prevent any parading of the Ku Klux Klan. There has been a good deal of talk for the past three or four months concerning the Ku Klux Klan. I heard the testimony with reference to Carl Sorenson's bond. The first I knew of

Sorenson's arrest was early in the morning his wife called me on the telephone and told me he had just been arrested; shortly after at my office she asked me to help her get a bond. I went to Dr. Goodfriend and asked him if he would sign such a bond. He refused and gave me certain reasons for his refusal; he stated in the first place that he had previously signed some bond and that a report of that had appeared in the newspaper and among other things his wife didn't like it, and wouldn't like to have him reported as signing bond or bonds in that sort of a prosecution because of the nature of the case, it being a liquor case; altogether I approached him about it three times; Sorenson was in jail during all that time; he was arrested on Saturday morning and released some time the following Monday. The second time I talked to him he told me practically the same thing; he finally said if a bond couldn't be arranged for any other way he might consider it if Mrs. Sorenson could find another signer to go on the bond with him. I told him, of course, that would be necessary anyway, and the matter was left at that. Some time on Monday, the 29th of January, Mrs. Sorenson brought a lady to my office who was willing to sign Mr. Sorenson's bond, and I got in touch with Dr. Goodfriend and asked him to come in, which he did; he finally said he would sign the bond with this lady and did so.

I acted as attorney for Ed Kemp after he was released from jail. I made my arrangements with Mr. Kemp direct. I made no arrangements with reference to Kemp's defense through Dr. Goodfriend; Dr. Good-

friend didn't send Kemp to me that I know of. As I understand it, he came to my office directly on his release from jail at the suggestion of Commissioner Jackson.

The first time Mr. Kemp's bond was mentioned to me, Dr. Goodfriend came to my office and told me that a man by the name of Ed Kemp had been arrested on the previous day in some raid on a still, and that some of Kemp's friends thought they could raise a bond for him, and inquired whether I would see to placing the money in such a manner that it, not being Kemp's money, would not in the event of conviction, be taken to pay his fine. Goodfriend stated that he had been requested by some of Kemp's friends to look after it and he came to me for the purpose of having me put up simply as bond money and not Kemp's money. I told him if the money were raised to let me know and I would look after it; I told him at the same time that if they were going to raise the money and wanted to be sure it wouldn't be taken to pay a fine they could place it with a surety company and get a surety bond; Goodfriend said he would call up Ensign & Ensign and see about getting a surety bond. Later in the day he came to my office and told me that he had called and that they would write the bond if the money were deposited, but it would cost $20.00; later I went to the doctor's office and told him I didn't think there was any necessity of spending the $20.00; that the cash could as well be put up; it would be just as safe as it would be in the hands of the Surety Company; he told me to look after it and do it that way. Later the same

day he told me that the money was ready and I went to his office and in his inner office at his desk he counted out $1000.00 and I explained to him that I would take a receipt for it in my name as trustee for several third parties; so it would be understood it was not Mr. Kemp's money; I don't know who contributed the money except what I have been told.

I never had any conversation with either or both of the Sorensons when Dr. Goodfriend was present. The professional conferences which I had with him were had in my office and nowhere else; the first time I ever heard of Mrs. Sorenson or her troubles she called me at my house the morning of January 11th, the day after she had been arrested and asked me to come to my office; about 9 o'clock she called me at my office; she came to my office and told me the Vernon Hotel had been searched and she had been arrested the day before. That was the beginning of my acquaintance with her; I have talked to Dr. Goodfriend in his office, but have never had any conversations with either of the Sorensons there; or any professional conferences there with anyone else. Dr. Goodfriend took me into his office and told me that some one had told him, by way of gossip, that it was reported Mr. Webb claimed to have bought a drink at the Vernon a day or two before; he never made any such direct statement to me; that was after Mrs. Sorenson was arrested; I never knew Mr. or Mrs. Sorenson prior to her arrest on January 10th. On one occasion I was talking with the doctor in his inner office and when I came out Mrs. Sorenson was waiting in his waiting room. I had opportunity and

occasion to observe Mrs. Sorenson's mental and nervous condition. When I first saw her she was very nervous and at times almost hysterical. She was mentally upset, and after her husband was arrested and an abatement filed against the hotel her condition was very much aggravated, became worse. Beginning with her arrest on January 10th and culminating with the arrest of her husband and abatement proceeding, her condition gradually became worse, more and more abnormal. That is the reason I consulted Dr. Goodfriend about her husband's bond. After her husband got in jail, the woman was almost beside herself and she was in a lamentable condition mentally, at least it seemed so to me. The first day she was in my office five or six times; the next day, Sunday, she called me at my house three or four times; on Monday she was ready to see me before I was at the office, and she was in there a couple or three times that day before the bond was finally fixed up; I spoke to Dr. Goodfriend about her apparent condition; I had learned that he was her physician and had been treating her, and I talked with him about the woman's condition. I never asked Dr. Goodfriend to get a bottle of bonded whiskey for me.

Dr. Goodfriend never called me up in connection with Mrs. Sorenson's case. The first I ever knew about that was when she called me at my home on the morning after her arrest. Nobody on the night of January 10th talked with me with reference to Mrs. Sorenson or her case. I represented Mrs. Goldsberry at her preliminary hearing in Justice Court; that is as

far as that case has progressed; I became Mrs. Goldsberry's attorney because she came to consult me about her case. That is all I know about it. She came to my office. I filed for Mrs. and Mr. Sorenson in connection with the criminal charge brought against them a petition to have the search warrant and the search held under it illegal; that is the extent of my connection with that case up to the present; I filed a petition which is specially filed in that sort of a case for that purpose. I saw a good deal of Mrs. Sorenson from January 10th to the time the abatement action was filed. She did a good deal of talking; it depended on her mood whether she talked in a low or loud tone of voice; sometimes she seemed to be melancholy and very subdued and despondent, and other times she was pretty well strung up and talked in a loud and high key; she did quite a lot of talking at times. I have represented Carl Sorenson in criminal matters only insofar as his interests were combined with his wife, insofar as the search warrant was concerned. She was arrested by the commissioner and bound over to this Court. Before I took any action an information was filed in this Court against her and her husband jointly.

My office phone is 777. I heard the part of the testimony of Mr. Nickerson, the prohibition agent. He testified that he heard Dr. Goodfriend go to the telephone and call 777 and say, "Is Mr. Smead home, tell him to hurry right down." 777 is not my home number, he didn't get my home if he called that number; that has been my office number for about 12 or 14 years; my house number is 682-J.

There are a good many other tenants on the 5th floor of the Empire Building in and out of Dr. Goodfriend's office, and he was out and in a good deal. I do not recall of any instance when I knew that Dr. Goodfriend's office was locked, and I can't now ever recall of seeing the outer door closed during the day time, at least. If Mr. Nickerson said he called 777, he wasn't calling my home; I recall some other testimony that was given about an alleged conversation between the doctor and myself concerning Ed Kemp; after I put up Kemp's bond money, probably the next day, January 17th, the doctor asked me in substance what kind of a case they had against Kemp; he apparently wanted my opinion, and I told him that at present they had merely charged him with possession, and further than that I didn't know what the final charge would be, whether they would lay more than one charge against him or not. I didn't say that they couldn't convict him for manufacturing because they didn't catch him when he was running the still; not while I was awake, anyway. I had no idea that he could not be prosecuted unless he was caught with the still in operation.

ED WARD, a defendant, testified as follows:

Age 26; single; raised in Boise; worked at the Natatorium, the Ford garage, and drove taxi for the Central Auto Livery. Was in the service during the war, went back to the Central Auto Livery until November 1, 1922. Had been living at the Oxford Hotel because I got room rent in addition to wages; the room rent was cut out and the wages reduced. I quit employment; I could not afford the room rent and moved to

the Union Rooms. My room there was $4.00 a week; I am not and never have been interested in the Union rooms; it has eight or nine rooms; I know Mrs. Goldsbury, the lady who runs the place. Have known Dr. Goodfriend about three years; took an application to be examined for the Eagles Lodge to him; have hauled him in a taxi several times when his car was out of order. In January, 1923, I consulted Dr. Goodfriend professionally for eczema on my arm which inconvenienced me very much; this was about the first of the year; he prescribed for me; later I consulted Dr. Ward. He gave me a prescription which made my face sore and my eyes were swollen shut next morning. I went back to Dr. Goodfriend; I have the trouble still. Consulted Dr. Goodfriend a number of times in January. Have known Mrs. Sorenson ever since I was small; I knew her when she lived at Star; I met her husband last summer for the first time; do not know him very well. If he called 3141 about the 28th of December, 1922, it was not I. I never talked to Carl Sorenson in my life over the 'phone.

I might have been in Goodfriend's office on January 9th; I don't remember the dates I was there; I usually went in the forenoon. Do not recall going there in the afternoon. I don't remember ever being there as late as 7 o'clock in the evening. I had no conversation with Dr. Goodfriend about having me as his outside man, and establishing a gallon route; he did not say I would have to get a decent sort of a car and I didn't say to him that I had nothing but a Ford now. I couldn't have said that because I had no Ford or any

other kind of a car during the last year. I had no access to a Ford or any other kind of car since I left the Central Auto Livery; a year ago last fall I had a Ford bug. I sold that to Frank D'Amant of Boise. I never discussed with Goodfriend any arrangements between myself and him or anybody else to sell or possess liquor.

I remember when the Vernon was raided. I heard of it the evening of the raid on the streets, and read about it in the papers; subsequent to that I was in Goodfriend's office; it might have been on January 10th; I might have been there on the 14th of January; Several days after the raid on the Vernon when I was at Dr. Goodfriend's office for treatment, I remarked about the raid and Mrs. Sorenson's arrest, and he said he had heard a couple of attorneys discussing it and in their opinion the search warrant was illegal. He said only that in order to obtain a search warrant from the Government some one has to swear to an affidavit that there is whiskey in a certain room, registered under a certain name, and that there was a mistake of that kind in the search warrant; that conversation had no personal reference to myself. I knew Mrs. Sorenson and knew Goodfriend was acquainted with her; I have seen her in his office; knew she was there as a patient; I may have been in Goodfriend's office on January 26th. I was there once when Mrs. Goldsberry was there. I didn't go with her. I don't remember what day that was. I think it was in the afternoon; she was sitting in the reception room; I went into his private room for treatment; the door was closed; Mrs.

Goldsberry remained in the reception room. I don't recall any conversation at that time. I did not say all my friends were in jail; I had no friends in jail that I know of.

I didn't know Ed Kemp prior to my arrest on this charge. I first saw him in the U. S. Marshal's office on February 12, the night of my arrest; I never knew Defendant Kinney prior to the night of my arrest; I had never seen him that I know of. I had a speaking acquaintance with Sheriff Agnew, never held a conversation with him in my life. I know Chief Griffith to speak to him. I first learned that I was supposed to be in conspiracy with these parties the night of my arrest; I never agreed or conspired with anybody concerning the possession, sale or manufacture of intoxicating liquor; when I saw Mrs. Goldsberry in Dr. Goodfriend's office, I didn't go there with her; she had been a patient of his; she is the lady who conducts the place where I room; about the first of the year she was threatened with pneumonia; she was in bed for a few days; it is possible that there may have been a call from Dr. Goodfriend which I answered about that time; I do not remember; the conversation testified to by the witnesses for the Government relative to any arrangements contemplated between you and Dr. Goodfriend concerning liquor did not take place.

ON CROSS-EXAMINATION the witness testified:

The proprietor of the Central Auto Livery is Joe Millich. My employment ceased November 1st. I have had no steady employment since. I have been stopping at the Union Rooms. When Mrs. Goldsberry

was ill I answered the telephone and looked after things around there once in a while; anyone that happened to be there did it for her. I was not there most of the time. I had no employment, but I did a few odd jobs.

Dr. Goodfriend did not tell me he wanted me not to get moonshine whiskey from anyone else, to get it all from Carl, because if I got it from anyone else it would just help to keep them here; no such conversation occurred. He didn't tell me that if I bought it from anyone else he could not afford me protection. He didn't tell me to start a gallon route about town nor if anyone wanted 10-gallon kegs to let them have it, but be sure and get the kegs back. I did not tell him that I had sold a girl from Nampa two bottles or that I could establish a trade outside of Boise. He didn't tell me I was to register under a fictitious name when I was away. He did not tell me to be careful about my caches; to change them every day and more than once a day if necessary. He didn't tell me to go right ahead except to be careful about the caches; he didn't tell me not to shut down but keep going and be careful, nor did he say anything about Colonel Marsters; he never mentioned his name to me in his life. I didn't say they watched my place Friday; that I was afraid if somebody got a bottle and then when he went out of the door some of that gang would hit him in the head; I didn't say anything like that; he didn't say they couldn't search anyone without a search warrant, it wouldn't be evidence; don't sell strangers a drink; he didn't say to put the cache in a room and register that room under a fictitious name. He didn't say not to

lay down on the job or anything like that at that time, or any other time. When Henrietta Goldsberry was there she was in the outer office and the doctor was there with her. The doctor and I went into the inner office; she might have gone away with me, but I don't remember of it; I did not hear any conversation between her and the doctor at that time.

ON RE-DIRECT EXAMINATION the witness testified as follows:

About three weeks ago I paid Dr. Goodfriend $7.00 in front of the Idanha Hotel; just happened to meet him there and asked him how much I owed him; I never paid him any money at any other time; the day I paid him was before the indictment, for the treatment I had received. As near as I can remember, I was in his office five or six times during January.

CARL SORENSON, a defendant, testified as follows:

I am the husband of Edith Sorenson, one of the defendants; 42 years old; 3 children; residence Vernon Hotel, Boise, since November 15, 1922; prior to that at the Union rooming house; was in the Union from June to November. Prior to that time I lived in Denver, Colorado, for over five years; am night yard master for the Union Pacific; came here on a telegram that my wife was sick last June; she came here because Dr. Krakaw advised me her nervous condition would not stand the high altitude any longer. About the first of March, 1922. I am on an indefinite leave of absence; still in the employ of the Union Pacific; I have not been well since my operation last June at Denver; have had intestinal trouble ever since; I am all right and other times am in bed with it.

(Defendant's annual pass on the Union Pacific, marked Defendants' Exhibit 35, offered in evidence.)

My wife had furnished the Union rooms when she came here. It has about eight rooms. My wife was living there when I came here and she had some roomers. The other rooms were furnished for us to live in; when the boy and I came. I know Dr. Goodfriend; I met him four or five days after I came here; my wife called him; he has treated me practically ever since. I go to him according to the way I am feeling; if I feel worse I go more often; my wife's nerves were getting bad again when she came here; her ear was operated on the first part of July by Dr. Nourse; since then I have had Dr. Maxey, Dr. Heine, Dr. Jones and a couple of doctors in Nampa; Dr. Goodfriend started treating her in August; she is still doctoring with him; she would consult him twice a week and sometimes three or four times. At the present time she is sick in bed, for the past two days.

We left the Union rooms November 1st; bought the Vernon Hotel, are living there now. I have had liquor in my possession at the Vernon Hotel, about three quarts; never had any other amounts there at any time. Never sold any there; my wife never sold any to my knowledge. I know Defendant Kinney when I see him; first met him the day my wife was arrested; I was not home when she was arrested; I saw Kinney when he brought my wife from jail to see about her bond and took her to the hotel; I was at Dr. Goodfriend's office. I had called up and found out her bail was $500.00. I didn't have that much myself, so was out trying to

get the rest of the money. Dr. Goodfriend was practically the only man to whom I felt like going; I hadn't had any dealings with anybody; I got $300.00 from him at that time; I had the other $200.00; when I first went to Dr. Goodfriend he didn't have that much money. I told him he knew I couldn't leave her in over night, and I didn't know where to get the money if he couldn't help me; he said he would do the best he could to get it; I left word with the boy if his mother came home tell her to come over to Dr. Goodfriend's office, and while the doctor and I were talking my wife and Mr. Kinney came there. We talked a little and I told Kinney to take her back and I would see if I could get the money and would call him. The doctor got the money; and it was arranged that I was to pay it back to him as quickly as possible, not over a week or ten days. I paid it back. The money was raised and Mr. Kinney came back to Dr. Goodfriend's office. We counted the money out to him; he said he didn't know whether she would have to go back with him or not, he would find out; he called somebody on the 'phone and said she would have to go back with him. He took her up to the county jail and she was released then.

I have seen the defendant Agnew four or five times. The only time I really met him was the first of October. No arrests were made after that search. I had seen Mr. Agnew a couple of times up at the Elks' lodge. I know Mr. Ward; I know Mr. Hill, have just talked to him up at the hotel once or twice, when he came up to look the register over; I know defendant Griffith

when I see him. I couldn't state the dates when I have been in Dr. Goodfriend's office; I have been there myself and generally go with my wife when she goes up. I never talked to Goodfriend about operating a still; I had no occasion to; nothing was ever said about; calling up Ed to find out whether he wanted anything. I never called anyone by the name of Ed from the doctor's office; I never called 3141 from his office. On January 10th I was in Goodfriend's office; I did not have any conversation with Kinney about the validity of search warrants; I think I said they had room 207 but we didn't have any room like that; Dr. Goodfriend didn't say at that time for me to go and Kinney to follow later. I remember I said I would go over and get my wife ready to go back with Kinney; the telephone conversation I remember was when I called up the hotel. I didn't state to Dr. Goodfriend at that time that I had 50 gallons and couldn't sell it. All I remember ever saying was after I saw in the papers Ed Kemp had been arrested with 50 gallons; I believe I made the remark to the doctor that it was a wonder he kept 50 gallons on hand; that was Ed Kemp, one of the defendants. I had seen him around the streets. I didn't know his last name was Kemp; I never had any conversation with Dr. Goodfriend about the Union Rooms; never told him Edith sold out all she had on hand or that she didn't shut down at all after the raid; he did not ask me to take Ed Kemp some tobacco to the jail. I didn't go to the jail to see him. I did not call 26 and ask for Kinney. My wife never said in my presence that she paid Hill $75.00 a month or paid

him a dollar a day since she had been at the Vernon. We never paid Hill anything for protection or anyone else, nor did my wife to my knowledge; I never saw Mrs. Curtis that I recall prior to the time she came on the witness stand. Dr. Goodfriend didn't state to me that we wouldn't start again until we got this thing all cleared up nor that they would have got my car if it hadn't been for him. I never had any conversation with him about my car. I don't know whether he knew I had a car or not; I don't know anyone by the name of Tip. I have never talked to Dr. Goodfriend about such a man; Dr. Goodfriend didn't tell me he wanted me to bring him a receipt for the $500.00 bond; a few days after my wife was arrested she got a receipt for her bond and took it up to the doctor because we hadn't paid him his $300.00 yet. I got that receipt from him when I paid him the $300.00. I had one conversation with him about the arrest of Ed Kemp; I said I didn't see how they can keep him out of jail for that; I can't place the dates; I have no notes; I don't know Defendant Evans; I never saw him before I came here to trial; I never talked to Dr. Goodfriend about him; Dr. Goodfriend never said he was going to give me any money for Tip; he never gave me any; I don't know any such man; I got $50.00 from Dr. Goodfriend once; that is the check which is an exhibit here. We bet on the Twin Falls-Boise football game Thanksgiving and he lost. My boy is going to high school; I bet against Boise because I thought they would lose; they were pretty well crippled up. The only time there was anything said about Defendant

Hill was one morning when we were talking about Dr. Almond and I said Hill was up to the hotel last night and wanted to know if we had any girls there and looked the register over; then I said I heard they quarantined the California. I never heard any other discussion about Hill. The doctor said that Chief Griffiths thought that my wife had made some affidavit or something to somebody to go in front of the Grand Jury against the Chief; I said no such thing took place because my wife wouldn't do anything like that unless I knew it, and I couldn't see what she could say against the Chief. We started to go and the Chief came out into the hall and asked us if we knew of anything he had done; we said we hardly know you, either one of us; I believe he asked whether his men had taken any money from me or my wife. I told him no. Sam Webb was never mentioned, and I didn't say that I had two men who would say I didn't sell him any. I didn't sell Webb any whiskey nor did my wife to my knowledge. I never had any agreement or arrangement with the defendants or any of them, or anybody else concerning the manufacture or sale of liquor.

I had three quarts of whiskey in the hotel for my wife and myself, to make her some hot toddy so she could sleep. She would go three or four nights without sleeping at all, and I told her to ask the doctor if whiskey would hurt her. Later she said he thought it wouldn't hurt her, she might try it. I don't know the man who brought it up.

ON CROSS-EXAMINATION the witness testified as follows:

I got the whiskey for our personal use; I take a drink once in a while; a man came to the hotel and asked if we could use any whiskey; I had never seen him before. Some days I would take a drink. I take it out of a whiskey glass. I kept the whiskey in our bed room in that big pitcher there. There was a towel over the pitcher. I kept whiskey in the bottles, was going to bottle it up. It was in the jug when I got it; I poured it into the pitcher to let it set and let the fusel oil arise on top of it. I was going to bottle it and spilled it on the floor; my wife then went and got me the tray and pitcher; the Federal officers poured some of the whiskey into the small bottles. I made myself some beer that spoiled. I was going to try to make another batch, and intended to use the corks to bottle up the beer.

The football game was on Thanksgiving day. I got the check a week or ten days later. I had no trouble collecting the bet. I mentioned 50 gallons to the doctor once; it was on the 14th when Kemp was arrested. I know when he was arrested. I have heard it enough by now.

There is no room 207 in the hotel; there is a room 2 and a room 7; we lived in rooms 2, 3 and 4. The whiskey was found in room 2. I didn't telephone not to let Florence in room 7.

Kinney left Mrs. Sorenson at the hotel while he came over to Goodfriend's office when I called up and told him we had the money. There was no particular reason for his coming over to Goodfriend's office; I think the doctor counted the money out on his library table. There was no reason why I didn't give it to him; I

don't know whether we left the Empire Building separately or together. I said I would and get Mrs. Sorenson ready.

ON RE-DIRECT EXAMINATION the witness testified:

I never had any cache of liquor in the Vernon Hotel at any time that I was there.

MRS. A. J. BROWN, a witness for defendants, testified as follows:

I am a married woman; live in Boise; am Dr. Goodfriend's niece by marriage; my father is his wife's brother. My family lived on the Evans place next to Dr. Goodfriend's place across from the Whitney school in the spring of 1922, and moved away in September, 1922. I was married in August, 1922, prior to that time I lived with my folks on the Evans place; there were papers and periodicals brought over to that place from Dr. Goodfriend's place. *Idaho Farmer* was brought over. I saw it there. It came frequently; those papers were subscribed for by Dr. Goodfriend; came to his house and then over to my father's house. I have read articles in them. The issue of *The Idaho Farmer* marked Exhibit 15 and 16 are such as the papers that were mentioned, left strewn around the house when my folks moved away.

CROSS-EXAMINATION:

Mother said she wouldn't take any of those old papers and left them lying there. They were not cleaned up and burned.

JAMES KINGSLEY, a witness for defendants, testified as follows:

Residence 404 Empire Building. Have lived in Boise 33 years; am engineer in the Empire Building. Have worked there for 13 years, ever since the building was built; my duties take me to the various offices to make repairs and replacements; I know where a man named Guy Curtis had offices during the months of December and January last past; on the 5th floor adjoining Dr. Goodfriend's office; there was a connecting door between the one Curtis office and Dr. Goodfriend's private office; I went in to fix that door on Sunday morning, February 11th. I put battening or moulding around on the cracks; before repairing the cracks I looked through them; the widest crack was about 1/8 of an inch; in places it was narrower than that. You could see from the crack the other side of the office, a space about 6 inches wide; that is taking in a field of vision about six inches wide across the office. I examined the top of the door around the top where it didn't quite fit up to the frame. The crack was about the same as on the side of the door, and at one corner probably a little over 1/8 of an inch wide. It got quite narrow toward the back of the door; through that crack you could see the top of Dr. Goodfriend's desk, that is the side that the windows are on on 10th street. You couldn't see on that side clear to the floor. There is a little room partitioned off in the doctor's office constructed of wood and glass that isn't transparent; that partition extends a little over six feet from the floor; it would not be possible in looking through either of the cracks to see any person who happened to be seated on the 10th street side of that partition. It

wouldn't be possible in looking through the crack on the hinge side of the door, the vertical crack, to see any one standing close to the corner of that partition; the field of vision strikes the opposite side of the doctor's office about the edge of the first window from the corner of the building, the one farthest south. I fixed that door on the 11th of February by orders of Mr. Richards, manager of the building; he told me to do that on February 8th; a week or ten days prior to the 8th of February, Dr. Goodfriend had spoken to me about the condition of the door; I didn't fix it because I had no authority to go into rooms without Mr. Richards' orders.

E. C. BOOM, a witness for defendants, testified as follows:

Residence, Boise, Idaho; 53 years old; Federal Prohibition Director for Idaho since organization of service to August, 1921.

I am acquainted with Dr. Goodfriend since the summer of 1921. I am now practicing law in the Empire Building in Boise; my office entrance is almost directly across the hall from the entrance to Dr. Goodfriend's offices; during the past fall, in the political campaign, I heard Goodfriend express opposition to Agnew's candidacy, I had a good many conversations with him; he said he disliked some of Mr. Agnew's then deputies, particularly Bud Driscoll and Andy Robinson, that Driscoll had been a bootlegger, and on one occasion had arrested Goodfriend when he was unarmed and made no resistance, backed him up against the wall with a large revolver and made him hold up his hands, and he said

on account of that he had a great deal of personal animosity toward Mr. Driscoll, and he didn't think that was the kind of a man to have for deputy sheriff.

At times Goodfriend has expressed himself to me as against the moonshine liquor business, said it was very closely related to the problems of social diseases among young people.

ON CROSS-EXAMINATION the witness testified as follows:

I don't know that he proposed the recent campaign to clean up social diseases here; I heard him say it would be a great check to the diseases referred to if the young people could not have moonshine whiskey and automobiles; I don't think Dr. Goodfriend ever expressed himself to being opposed to prohibition laws as they now stand or ever have stood; the conversations were brought about concerning what he said concerning moonshine as being related to the younger generation.

WILL LYLE, a witness for defendants, testified as follows:

Residence South Boise; have lived here about 20 years; I am a laborer, sheep shearer, logger, anything in that line; family grown up, two children, live with my mother.

Have been here the past winter; know Ed Kemp, the defendant, for 14 or 15 years; know of him being arrested last month; a man by the name of Henry Hammock spoke to myself, Joe Gakey and Jim Whiting about procuring bail for Kemp; we did so; I contributed $300; I asked Dr. Goodfriend how the money

could be put up so that none of it would go for a fine or attorney's fees; he said he would find out and afterwards told me and I turned the $1000 to him for Kemp's bail; I don't know how he arranged it except what he told me.

ON CROSS-EXAMINATION the witness testified as follows:

I am not doing anything at present. I am going sheep shearing right away; haven't been working since October; I don't know Henry Hammock's business, I don't know where he works; I see him around a good deal; Joe Gakey had something wrong with his eye; Goodfriend treated him; think he has nothing wrong now; Hammock said Kemp wanted to know if his friends would see about getting him out of jail. We had known him quite a while, discussed the matter at the White House Cigar Store; Gakey said he was going to Goodfriend's office the next morning to have his eye treated, and I said I would go up with him and ask Goodfriend about putting up the money; I said if I go to an attorney he will charge for it, and if we can find out without paying it will be better; I thought the doctor might be able to find out.

I haven't worked any since October; Gakey put up $350, Whiting put up the rest; I turned the money over to Goodfriend.

ON RE-DIRECT EXAMINATION the witness testified as follows:

I don't know where Whiting is just now; about February 1 he said he was going to Baker, Oregon, and I haven't seen him since.

HENRY GOODFRIEND, a defendant, testified as follows:

Live in Boise 11 years; born in New York City, 48 years old; married, have a son, my wife's boy, at the State University; have been practicing medicine for 25 years; educated in the New York public schools, the College of New York, Columbia University, Universal Hospital in Vienna, and was at Heidelberg; have lived in the West 20 years or more; was once physician for construction company in Nevada, came to Idaho about 1902; have an office in the Empire Building in Boise on the 5th floor, have been there 9 or 10 years; practice has been of a general nature; try to specialize in diagnosis; it is rather difficult to do so here; do a good deal of genito-urinary work, that is venereal diseases; write prescriptions; maximum prescriptions has been as high as 128 in a day down to 60 or 70 a month; most prescriptions filled at the Whitehead Pharmacy in Boise, some at other drug stores. Have been called on to make contributions to all public causes, contributed more than $500 to the local opposition prohibition campaign in Idaho, contributed from $200 to $300 to the work of Mr. Buljen, an Evangelist who was here a few years ago; belong to and contribute to the Congregational Church; contributed twice to the Y. M. C. A. building fund, was a regular contributor until two years ago; contribute to the Sunday School work in this city from $25 to $50 a year.

Practice comes from this city and from outside of this community, some from all over the state.

Know Sheriff Agnew, Kinney, Griffiths; don't know

Hill very well, Mr. Griffiths; know Kinney very well and Agnew fairly well; know Carl Sorenson, his wife; have known Ed Kemp ever since coming to Boise; I have been the Eagles' Lodge physician, paid by the lodge, for five consecutive years; knew Kemp pretty well through that lodge; he has done me a good many favors; know Sorensons since sometime last summer; was called to their home when he was sick at the Union Rooms; met his wife there also; he has been a regular patient of mine, has a chronic intestinal trouble; his wife has been a regular patient since last August, has visited my office very regularly; Mr. Sorenson came a good many times also; his wife came with regularity about twice a week, then she came in more frequently, and when her troubles came on it seemed that she was there continuously; I don't care to say much in regard to a woman's illness, will say only in the sense that it might bear on this case; she is a nervous, hysterical woman, bordering at times closely on melancholia, then at times her condition is such that she has suicidal tendencies; then other times she is extremely excited and difficult to control, she complains of creeping sensations and extreme insomnia.

I took interest in the political camapign before the primaries last summer, I usually do. I was interested in the defeat of Agnew at the primaries; I fought him because his deputies didn't set right with me, particularly Bud Driscoll; I feel that as a citizen I might be handled without having a gun pushed in my stomach without being called a son-of-a-b—. He did that to me and I never felt kind towards him; also I didn't care

to be arrested by a professional bootlegger; I heard Mrs. Coppedge's testimony; she lives near my home, on the bench across the river near the Whitney school house; I have lived there ever since I have been in Boise; it is about 2½ miles from town; one primary election day I talked to Mrs. Coppedge and some other women, I was interested in Jackson, who was running against Agnew; I wanted Whitney precinct to give Agnew as few votes as possible; I told those ladies some things I thought I knew, I think I referred to certain bottles of liquor which I had possessed and had labeled; I had those bottles in a diligent effort to show that it came through Mr. Driscoll; I bought three bottles but the evidence was not sufficiently connected to make it a certainty; I showed those bottles to the prosecuting attorney; he knew I had them; Mr. Agnew won at the primary by a small margin; I saw him late that night in front of the *Capital News* in company with Carl Norris, justice of the peace; I congratulated him, told him I am a good loser, but that he didn't win because I wanted him to; I told him I would give him one barrel and would fight him harder at the general election, would make every effort to defeat him; he had already asked me why I was fighting him and told me not to be too hasty, he had a change in mind; I told him I wasn't particularly fighting him but was fighting Bud Driscoll; he suggested he would see me later, and did at my office in the Empire Building; we talked over general conditions, I talked as to general election and the outcome, and he finally told me he had made up his mind, because of other people having similar objec-

tions, to let Driscoll go; I told him if so he had my hearty support; a day or two later I met Agnew in company with Deputy Kinney at my offices; they came there together to talk about plans for the campaign; I had decided to interest myself in Agnew's cause; he brought Kinney there. I told him I would like to have the assistance of some good man in his office; I saw the sheriff quite frequently during the campaign at my offices, and almost any place, I had quite a little conversation with him concerning politics; he would tell me something he thought I ought to know, I would make suggestions to him, as in all political campaigns; I was not managing his campaign, I did what I could to help him; I was a member of the Eagles Lodge; I think I am a member of every lodge except the Knights of Columbus; I belong to the Knights of Pythias, the Knight Templars, the Shrine; I spoke to all my friends, did what I could to minimize the chances of Agnew's opponent, and in a general way did what I could to effect his election; he left me $100 for campaign expenses; I expended some of it to distribute cards and hire people to distribute the cards; one morning Mrs. Coppedge called me about some girl who was sick in her home and I suggested she might take that job for $10 but she didn't; I spent in all I think $75.50.

I saw the sheriff about a week after election. Mr. Kinney was present. The conversation was a sort of post-mortem after election. I congratulated him and he thanked me. We had a ratification meeting. I have not maintained any continuous party relations in

politics, have not considered myself a fixed member of any particular party; I have followed the Democratic ticket most of the time, have voted against it for individuals at times; in county and local matters I have voted outside of the party; it wasn't anything unusual for me to support Agnew, it isn't against my scruples to support a Republican if I want to; in that instance I had definite reasons for not supporting the Democratic candidate; I don't remember any particular occasion of seeing Agnew again in November, nothing that impressed itself on me.

I heard Mrs. Curtis testify for the government in this case. As nearly as I can recall, I talked to Agnew early in December about some barrels in connection with distilling. Agnew came in for some purpose, I don't quite recollect what, and then remarked he was some place close on Abbott's trail and I understood he was so close he had to move his barrels, something to that effect; I know of Carl Abbott; I have a vague idea as to that conversation, I think it was something about tying a barrel back of a wagon and dragging them or something. I never had any talk with the sheriff at any time about he and myself having a still, or about his getting barrels for use at any still; I have not been interested in any distilling enterprise or in making whiskey; I am sure I never heard the sheriff say anything about taking barrels to any still in the daytime, that it would look less suspicious; nobody ever said that to me; I never heard Carl Sorenson call 3141 or the Union Rooms in my office and talk, about anybody's taking a sack of anything; Sheriff Agnew said some-

thing to me in December about a note he owed, as I can recollect it he said he was in debt a little, he had a note due, and I told him I had a little money then, if he wanted it he could use it until I needed it, but he declined; I never heard the sheriff say that he and I ought to have $1500 by the first of the month, he never told me he had 3 gallons he would like me to get rid of for him; I never told him, speaking of three gallons, to put it in stone jugs; I believe I had some conversation in January with him about the Union Rooms. I had learned about an arrest made there; I knew of the party, a Goldsbury girl, had been her physician after her arrest; about the first of the year she had a pleural pneumonia; I said to the sheriff something about his making the arrest, that I was sorry she got in trouble again, she had been having hard luck, had been sick and arrested once or twice; I have forgotten the details of the conversation; the sheriff told me something about what led up to the arrest; the two boys were drunk, the sheriff's office was called and went and got them and they said they bought this moonshine some place; I think the sheriff asked me if I knew where Stewart was; I get the conversations mixed up. He asked me before that for a man by the name of Williams or something, but the Stewart conversation came up, too; I had talked to Kinney about Stewart before; I made him understand where Stewart was and they got him; I never spoke to the sheriff about him before; speaking of the Union Rooms, I never saw those boys and did not say that they were going to fly or would testify that they were

drunk and didn't know where they bought the whiskey; the sheriff did not tell me that he would get favorable jurors for the case; I did not tell the sheriff that he had another $25 coming from the Union Rooming House; he never had any sum coming from the Union Rooming House that I know anything about; I didn't tell him that anybody by the name of Carl had suggested to use all the money on hand to take care of the sheriff's note, or that Carl had saved $2,000 by furnishing a car. I never knew Carl had a car; I didn't tell the sheriff Smead wanted any bonded stuff; he never asked me to get any bonded stuff, I never knew where I could get any bonded stuff; the sheriff never told me I should not leave my door unlocked when I had any of the stuff in there, never discussed locking up my office; I think in 9 or 10 years I have been in that office my front door has never been locked night or day, and the door leading to my private office hasn't been locked 20 times. The door leading to the Curtis office, she could come into my room but I couldn't go into hers; all the time I have been there I have given the high school boys that run the elevator the use of my office at night; they do their lessons in my front room. I went through the Curtis office to get into my room several times, I left my keys at home; I came to my office and found my private door was locked several times and had to go through the Curtis room; I question that I locked the door on those occasions, but still it might have happened that the door would close.

After the primaries I told Mr. Agnew in a conversa-

tion that I would tell him later how much of the campaign fund was left, there was a few small bills to pay; he came later and I told him I had $24.50 left; I gave him $25; he told me to keep it; I told him I didn't do the work for money and gave it to him; that occurred in my private office near my desk; he was sitting down, I think, and I was standing up; he said something about going to Portland; I told him to go ahead and have a good time. I wasn't much interested after that, I had everything settled. Sheriff Agnew hasn't been to my office for a month or six weeks, unless sometime when I wasn't in.

Recently my attention was called to the crack in the door, somebody told me it didn't look very good in a doctor's office, the light shines through a little; it never bothered me; I spoke to Mr. Kingsley about it; he did nothing at that time; some time after I spoke to Mr. Richards; on the Sunday before the indictment was returned, I came down and didn't have my key and went through the Curtis office, found the door was fixed so that I couldn't go in.

I never met Kinney until the campaign, I then became well acquainted with him; he became a patient during the campaign, I think in October; he came frequently as a patient, two or three times a week; sometimes I called him at the sheriff's office to come in because he overlooked his visits sometimes, sometimes it was my fault; I am not always regular about staying in the office; we used to talk over various topics, I had conversations with him about the moonshine whiskey traffic, quite a few of them; I discussed with him moon-

shine as related to venereal diseases in my practice; I was more interested in the question of fallen girls, and I spoke to him about the type of bootleggers that distribute at the dance halls; I mentioned names to him to be looked up; he was at liberty to use what I told him; I gave him information several times; arrests were made pursuant to that information; I talked with Kinney and a number of people in my office about the profits of the business; Kinney and I spoke about that two or three times; I figured it up in money and gallons to him; I never talked with him about any distilling opertions he and I were interested in, about setting up any place or still, nor with the sheriff.

I remember Mrs. Sorenson's arrest; I was in the office that evening, don't know how I came to be there; Carl Sorenson came up, said he had only $200 and asked me for $300; I wished to impress him that I wanted it back shortly; I told him I would get it and I got it; Mrs. Sorenson came up while we were there with Mr. Kinney; I left and got the money; it seems to me I was sitting in the office when Sorenson came in and then Kinney and Mrs. Sorenson came in; I gave the money to Mr. Sorenson, I think; the money was turned over to Mr. Kinney, I think in my front room; I did not call anybody on the telephone to discuss the search warrant or arrest of Mrs. Sorenson at that time; I believe Kinney called Jackson and said it was necessary to take Mrs. Sorenson back with him; some little time afterwards Mr. Sorenson paid me back. I did not say I was going to fight Mrs. Sorenson's case; Kinney did not tell me the Ku Klux Klan was after

Griffith, I never heard of that; I did not tell Sorenson and Kinney in what order they should leave my office that night. I don't remember that Agnew's name was mentioned; I have been called on quite a number of times before to help get bonds for people in trouble.

I saw Mr. Kinney in the month of January. I was treating him; I never talked to Kinney about Ed Kemp or his arrest. nor said anything to him about making $1600 with the mash on hand. I didn't have any mash on hand; I never made the remark that we ought to make $10,000 a year to Kinney; I didn't discuss a man named Tip in my office with anybody, I don't know such a man; I never discussed with anybody any moonshining operations that I was personally interested in, with Sheriff Agnew or anybody else, never made any arrangements with Sorenson or his wife concerning moonshining or selling whiskey; at one time Mrs. Sorenson inquired if whiskey toddy would help her sleeplessness; I told her she might try; at the time she said she had no whiskey; she told me afterwards she got hold of a little good liquor, said she was afraid to keep it, because she had all of her savings invested in that hotel and they were raiding and she was afraid it might cause her to lose her investment; it seems to me that she said something to me about where she kept the whiskey; after her arrangements she talked about the cause of her troubles in my office, thought Mr. Reynolds had it in for her, mentioned Mr. McBirney, some of the other rooming houses, Mr. Hill; she would get one idea at one time and another at another, and I didn't pay very close attention; she told me several

times she was afraid her husband might be arrested; said her attorney told her something about that; once she came up very excited and hysterical and thought there was a warrant out for her husband, that they were raiding or something to that effect; I tried to quiet her, remember saying that things would be all right and her husband would come home safe or something to that effect; at various times I took the same course with her, tried to quiet her down; it was pitiful at times to see the suffering she was undergoing, her mental attitude, it seemed to be all of a mental nature, and I tried everything I knew; I found the only thing that would relieve her mind was talking to her in a kind manner and quieting her down; she usually left in a pretty fair frame of mind. Last fall Ed Kemp spoke to me about his wife's condition; had been called to her home before that; I advised him it would be a good plan to take her some place where the atmospheric condition would be better than in the city; I talked with him about that two or three times; about the 1st of December he came to my office and explained that his wife's condition seemed to be asthmatic; I told him it would be a good plan to get a place on the bench, it might help her; I have done similar things for profits in similar condition; in the course of the conversation I remarked that the Evans' place next to me might be available; I had put two tenants on it in succession; I told Kemp he might try to get that place; Evans was at Gooding, lives there. I told Kemp this and we talked about how to reach him; he suggested it would be quite a trip to go and see him and I told him he could call by phone; he did call from my office;

he seemed in a hurry, because if he couldn't get that place he had another place in mind; Kemp got the wrong Evans and I took the phone and told the wrong Evans which Mr. Evans we wanted and I got him; I told him Kemp wanted to rent the place and Evans said if the man was all right he would rent the place, would leave it to me; he asked me how much rent he ought to charge, and I told him I thought $10 was enough; he told me to collect the rent and send it to him; Kemp said that was satisfactory; I told Mr. Evans so and the deal was closed. Kemp paid me $10 rent that evening; I sent a check later in a letter to Evans that night or the next morning; a few days afterwards Kemp told me he was going to move out there; said he was a little hard up and wanted some supplies; the next day or two he came back and asked me to lend him $50; I told him I couldn't spare that much at that time; he spoke about a payment on a car, and I finally let him have $35; the check marked Exhibit 27 is the loan I made him; at that time I did not know that he had any other intentions than to move out to the Evans place; when he spoke about supplies, he wanted some groceries or something to take out to his place, I told him I would help him get a little credit, to go down to the Star Grocery; I told the grocery I would stand good for a bill of supplies or groceries, something to that effect; later, when he came for a loan, I told him I had already helped him get supplies and he told me he hadn't used that credit; he said they didn't know him down there and asked me to call up and tell them he was coming down now to get the supplies; I did so; I know nothing more about

the matter than what he told me. I did not find he had used my credit twice until Mr. Baker came up with the bill some time in January, a short time before Kemp was arrested, I believe; then I told Mr. Baker I owed him $6 and something and that is what I was going to pay him; he said, "Didn't you call up and guarantee this bill?" I told him I called up about a bill of groceries or supplies and I find this is a bill of fifty odd dollars, instead of giving him supplies you gave him a sugar factory, I don't propose to pay for it; shortly after Kemp was arrested I saw him the day after his arrest; he came to my office in the afternoon about 5 o'clock; we had a talk, it wasn't very friendly; I told him that he had taken deliberate advantage of the favor, that he had known me all this time, that I felt hurt by it considerably; I referred to the sugar deal; he said he would pay the bill, and I said I felt more sore about the raiding of the place, he had got me tangled up with a neighbor and friend; I said he hadn't even brought the rent to me; he said he would straighten things out; he paid me the money for the Baker bill and the rent; I paid the second month's rent to Evans.

I bet on some football games last fall; I bet with Carl Sorenson; this must be the check I paid him; I drew it to cash because when I write a check for cash I think it is the same as giving the money; it isn't unusual for me to write a check for cash; I always tear up my checks; I keep only the checks I send my boy at Moscow, do that to see how much four years at Moscow cost; I have no business records, bill heads or

books, I do not take names or dates of patients and transactions, I do not keep books of personal financial matters; I have no system of records of my personal affairs; I know I have so much and most of the time it is very little and I don't bother with it. I was never on the Evans' ranch after Kemp rented it, never had occasion to go there; I think I never saw Kemp but once after the guarantee in the loan I made him; I go home for supper and come back and usually go to bed about 12 o'clock, get up in the morning and come down town, a sort of routine.

I have played cards some for money, have never been a professional gambler, have no interest in the place spoken of as Jap's place; I once had an interest in the place called the White House, but I had none since January a year ago; the Sheriff's office raided the place for card playing, that had a good deal to do with my closing out my interest there.

I am not a drinking man, I would not say I never took a drink, but I don't think I took very many; I know a man named George Susich, he is now running the White House; I never said to George Susich to make his own moonshine and I would make mine, or any words to that effect; I never made any moonshine; I never knew he is making any, I am not interested in the liquor or moonshine business; I have been joked a good deal about bootlegging business because I have advised and helped fellows who came to me, it seemed to me all of my friends joked me, in a joking way some of them labeled me the King of the Bootleggers. When my brother-in-law lived on the Evans' place, he

was sick, had his family there; I had helped in their support; I rented the Evans' place for them and papers and periodicals that came to my place went over to that place; the boys coming from the school across the street would get them and take them home to read.

ON CROSS-EXAMINATION the witness testified as follows:

My interest in venereal diseases is to the end of exterminating them; I objected to the campaign waged by state and city authorities for eradicating venereal diseases because I take the stand that as prostitution is not legalized, no one should take it on himself to single out a girl who lives in a rooming house and label her as a prostitute; it would only be one step farther to call any other woman a prostitute and call her before any board or commission for examination. I am not in favor of legalizing prostitution, and I am not in favor of the city or state sending a police matron to a home because of information that has not been decided in court, and label any girl or woman a prostitute; I spoke to the mayor in that regard and told him my stand and that it would surely have a bad effect; I felt that was the proper procedure. I flatter myself I am one of the few physicians that do not perform abortions, and I want you to know that, I have not performed one; I don't feel that I am a good church member; I contribute to churches and Sunday Schools; I have gone on bootleggers' bonds for the same reason I sign notes for people and give money to anyone that is in distress; I remember a man named Williams came into my office and I asked him how much he lost at cards the night

before; I did not arrange with him any signals to cheat at cards the following night.

I did not know Kemp was going to use sugar to make whiskey; I did not tell the ladies at the Whitney School on primary election day that Jim Agnew was a bigger bootlegger than Bud Driscoll. I said I didn't like Agnew's connection with Driscoll; I said that I had learned Agnew had bought the Vernon Hotel, I didn't make a specific charge; I might have said anything to change a vote; I said I had a conversation with Agnew in Delana's office; I showed the bottles to Mr. Delana, I have forgotten the details about that; I told Mr. Delana something about 28 cases, I couldn't prove it exactly. I told him what I knew at the time; I told those ladies about exhibits, and not cases; I gave Mr. Kinney in the course of conversation the names of bootleggers; I didn't give him any list; I think at one time in discussing eradication of bootleggers Marsters' name was mentioned; I think I put the Union on the list, I am not sure about the Vernon; I didn't know anything about Ed Kemp's place; his still was on five acres adjoining mine; I don't pass there as I go to work.

No candidate other than Agnew gave me any money for campaign expenses; I remember talking to him about barrels being dragged; I think he told me he had been by there sometime before that and I made the remark that he must have been close on his trail, I heard he had moved his barrels; I think later I knew something about Abbott's location, I did not give active information, I had nothing to do with the sheriff's office, simply spoke to Kinney about those things; I never told the

sheriff's office that Abbott's still was in a tunnel at Mayfield; I remember saying to Agnew about the Union Rooms that the poor girl was in trouble again; I said I sort of sympathized with her because she had been sick and in trouble before; I had merely a passing interest in her; I did not accuse Agnew of letting Robinson get a statement from those boys, I did not tell him to get rid of Andy Robinson; he did not say Delana got the statement. I did talk to Agnew about Stewart, the bootlegger who had gotten away; he asked me if I knew where he was; Stewart's wife was at my office, but I don't know whether I got that information from his wife or not, I don't remember knowing he was in Pocatello. I know there was a sheriff's convention at Portland; Agnew did not call me on the phone and ask me whether he should go or not, I didn't talk to him about that; on the 10th of January I did not call over the phone to ask whether the search warrant for the Vernon Hotel was good or not.

I remember when Chief Griffith was in my office; I don't remember calling Jap's place on the telephone when he left; I rather think I called Mr. Spencer and had some conversation, but cannot say right now whether that referred to the Chief having been up there or not.

Mrs. Sorenson was a regular patient in my office; I did not tell her to keep right on selling as usual or that this thing would blow over right away; I did not tell Mr. Evans our stories must jibe; in talking to him I had the object of avoiding the unpleasantness I had at the White House.

ON RE-DIRECT EXAMINATION the witness testified as follows:

We had a game of cards in Spencer's place. Someone called up and I went down; when the game was over Mr. Hill was outside, he said he would break in the door some night; I told him I wished I had some way of knowing, because I wanted to be four miles away when that happened; I told the Chief that if they wanted all card games closed I would like to know about it so that I could stay away from all of them, I didn't want any more advertisement than I had had; I told him what Hill had said; Ed Hill was never in my office that I can remember; I can't place his being there 6 or 7 years ago; Jap's place is a little place where Mr. Spencer and some of the boys occasionally played cards; he has a real estate office, we played cards in his back room.

ED KEMP, one of the defendants, testified as follows:

I am in no way connected with the other defendants or they with me; what I have been into has been on my own accord and with a party who has not been apprehended. I have been in Goodfriend's office about my wife, she is troubled with asthma; he suggested that I find a place out of town; he told me of the place next to him and I called up and could not get Mr. Evans; Goodfriend took the phone and straightened the matter out; I paid him the rent with the understanding that the city water was in the house; I found that the water was at the front fence and the house was probably 250 feet back; I became acquainted with

the person called Shorty, and after I got a little bit better acquainted with him in the course of conversations he suggested to me that if he had a place he would go and make some whiskey. I told him that I had rented a place that didn't suit me, the water was too far away; he said he would go out and look it over; we went out and he decided he could pipe the water to the house; he said if I would help him he would give me $50 to help pipe the water and help in mixing the mash; in a few days I got that money from him, after the water was piped in; I spent that money for household and other little bills; I needed more money and went to Goodfriend and asked him for a loan; that was before I received the $50 I mentioned. My associate had asked me to figure out some way to get some sugar and corn; I had borrowed from Goodfriend at times; I am a cement finisher and make pretty good money in summer months; have worked in Boise and throughout the state of Idaho; I went to Goodfriend and asked for $50 and he said he didn't have it; I asked him for $35 and to stand good for a bill of groceries, I didn't designate the amount of the groceries; he said he would do that, called up the Star Grocery, which is Baker Brothers, told them a man was coming for a bill of groceries; I don't know whether he mentioned my name or not; I didn't go that day but told my associate I had made the arrangements; he said we weren't quite ready yet to use the stuff and it went on a few days; then I went back to Goodfriend, told him that I didn't get the order, only a little part; eventually I got the second order; I don't remember the amount of the bill, it was

something like $55; Dr. Goodfriend didn't know of me getting that stuff until after he was arrested; at the sheriff's office Mr. Jackson told me the bond was put up and that Mr. Smead wanted to see me, the bond was put up through him; I saw him and we made an arrangement that he would find out what I was charged with.

ON CROSS-EXAMINATION the witness testified as follows:

I had known Goodfriend for 12 or 15 years; I have worked on nearly every building in Boise, and the sidewalks; I worked on the Troy Laundry until about the first of November last year; that was the last work I did; I have a wife and stepson, I live in Boise; I intended to move out on the Evans' ranch with my family, but I never moved out there; I would not tangle my wife in any such thing as I got into; I helped out there in the process of this, but I never took any part in manufacturing liquor; I don't know how; I made the arrangements with the other man two or three days after I rented the place, I had found that the water was at the front of the property; this man was called Bert, when I asked him his last name he said Smith was as good as any in that business; I never knew his last name positively; I never knew him before this time; I don't know his last name now, on my arrest he left there; the day I was arrested he gave me $65, told me he was going away and for me to stir the mash and look after things; it took probably a week to get the water to the house; I stayed with my family in town for several days, I didn't go out after the water

was in; when I returned there were barrels and other utensils there; it was about the 7th or 8th of December I got money from Goodfriend; I was pinched for money, was buying a Ford car on installments; I don't remember whether I wanted that money to pay on the car or whether I had paid what money I had to keep the car; I got $50 from Shorty after I got the money from Goodfriend; he had promised it to me; I don't know where he got it; it was a little bit before Christmas that I got it from him; I got the lay-out; he is not one of the defendants here; I went to Goodfriend because I had gotten money from him before; I got that because I needed the money myself, and I got him to stand good for a bill; that is the check, my car money was due on the 8th of December, the check is dated the 4th; I couldn't say the date I got Goodfriend to call up and O. K. a bill at the Star Grocery, it was somewhere about that time; I got two sacks of sugar on that order which was taken out by Shorty in his car; later I went back and told Goodfriend that I didn't get anything on that order; that was a falsehood; I got him to O. K. a second order and went down and got four sacks of sugar, he was never informed what I was buying, I told him I wanted provisions and left him under the impression I was going to move out there; I did this for the reason I knew he would be paid back and did pay him back; I did not purchase the goods at the I. X. L. Coal Company, the other party purchased that and I was out there and signed for it; he paid for it; by agreement I paid the Evans rent to Goodfriend, I had never seen Mr. Evans prior to my arrest.

EXAMINATION BY SEVERAL OF COUNSEL FOR DEFENDANTS:

I know Henry Griffith by sight, I never discussed the liquor business with him or agreed with him about possession or sale or manufacture of liquor, I never discussed the subject with him.

I know Sheriff Agnew as an officer, I never had any understanding or agreement with him about my movements on the Evans' ranch, he had nothing to do with those matters and knew nothing of my intentions; I know Carl Sorenson practically just by sight; I never talked with him about liquor, never saw him at the Evans' ranch; the towel offered as Plaintiff's Exhibit 18 I didn't notice in any way so I could identify it; Smith had a suit case there part of the time and some towels and his shaving outfit was there part of the time, he roomed around in hotels in different places in town; I know I didn't bring any towel out there; I never had any understanding with Carl Sorenson or his wife about the manufacture or sale of liquor; I first knew Mr. Kinney when I was called as a witness in state court; I never talked with him concerning a still or the manufacture or the sale of liquor; he knows nothing about this still.

Dr. Goodfriend has loaned me money at various times throughout the years I have known him; in time of need I could go to him and get money, I have borrowed as much as $75 in the winter time; I have directed my friends to Dr. Goodfriend, have tried to do him favors.

CARL SORENSON, a defendant, recalled to the stand, testified as follows:

I had never heard of the J. H. Evans' ranch before this trial, did not know there was such a place; plaintiff's Exhibit 18, having stamped on it "Vernon Hotel", I know nothing about that, I did not take it out there, do not know how it got there.

(It was stipulated that Justice of the Peace Carl Norris, if called, would testify to the meeting of Agnew, Goodfriend and himself on the night of the primary election.)

MR. DAVIS: At this time, if the Court please, I may say to the Court that I feel upon the whole case that there is not sufficient evidence to warrant asking the jury to pass upon the case of Mr. Hill, and I move that the indictment be dismissed as to him.

THE COURT: Very well.

MR. MARTIN: If the Court please, his bond then will be exonerated?

THE COURT: Yes.

MR. HEALY: I renew the motion made at the beginning of the trial that the government be required to elect as to which of these charges they will ask a conviction on, having reference in this motion to the motion made by myself at the beginning of the trail.

THE COURT: Denied.

MR. HEALY: Exception.

MR. CAVANEY: I would like to renew the motion in regard to the defendant Griffiths upon each and all of the grounds heretofore stated.

THE COURT: Denied.

MR. HEALY: I desire to make the same motion on behalf of the defendant Ed Ward.

THE COURT: Denied.

MR. HEALY: Note an exception.

MR. HEALY: An exception.

THE COURT: Yes, exceptions in each case.

At the conclusion of the evidence and arguments, the Court instructed the jury in part as follows:

I now come to an analysis of the indictment, and I will try to make that as brief as possible. You have been advised that the indictment contains six separate charges or counts. The first three counts are for conspiracy, that is, each one of the first three counts are for conspiracy, and each of the last three counts is for direct violation of what are commonly known as the revenue laws of the country, laws which have been upon the statute books a great many years, long before prohibition became even a state or a national policy. I will call your attention to those charges later on.

* * * * * * * *

Now, in the fourth count the defendants are charged with having wilfully and knowingly, etc., had in their possession and custody a still, set up and ready for operation, without having first registered the same. Now that is based upon a statute, gentlemen, of some length, and I am not going to try to read it to you. It would be confusing to do so. It is based upon a statute which, as I have already intimated to you, has been upon the statute books a long time. It was in existence when the country was still wet, as we put it. It provided safeguards in the enforcement of the revenue measures. The Government collected revenues

from the liquor business, various branches and features of it, and in one of the provisions of the law it is declared that one shall not have possession of a still set up—you will understand by that, not a still for sale, as a merchant would have it, but a still set up, ready for use; he should not set up any still or have it set up until he had registered in the manner provided by the law, with the collector of the district, with the public officer called the collector. That is the substance of the first charge. Then there is another provision in the same general law which provides that no one shall go into the business or engage in the business of distilling or being a distiller until he had first put up a bond to the Government, provided the bond prescribed by law. And that is the gist of the fifth count.

And in the sixth count it is charged that the defendants engaged in the making and fermentation of mash or wort fit for distilling purposes, for distillation, in a place other than a distillery, and that is made an offense by the same general laws. It was to require that all liquor, that is, fermented liquor, should be made in a distillery, a place well known, where Government agents could go and measure it up and find out what the facts were, for the purpose of collecting revenue. So you have those charges contained in the last three counts. Number four, having a still set up without first registering with the collector; number five, engaging in the business of distilling without a bond; and number six, making and fermenting mash fit for distillation purposes in a place other than a distillery. I have to say to you in respect to those three charges that upon his

own statement you would be warranted in finding the defendant Kemp guilty, if you believe his statement. As I say, I am not directing you to find him guilty. It is for you to say from all of the evidence, but if you believed his evidence, and there was nothing else, that would be sufficient upon which to base a verdict of guilty. It is for you to say what the truth is. Before you can find the other defendants guilty upon these three counts or any one of them, you must find that they knowingly participated in such violations of the law. It isn't necessary that they be present or actually or directly with their own hands take part in setting up or operating the still, if, with knowledge of Kemp's purpose, they knowingly aided or abetted him in the unlawful enterprise of having a still set up, if you find that he was engaged in that, even though they worked at a distance, that is, the other defendants, remotely, they, too, would be chargeable with responsibility, that is, under the general principle that one who aids or abets another in a commission of a crime is himself equally guilty with the principal and is punishable as such.

* * * * * * * *

To the foregoing instructions the following exception was taken and allowed:

Come now the defendants severally, and each for himself excepts to the instructions of the Court given to the effect that the defendants or any of them might be convicted on either of the last three counts of the indictment herein, for the reason that said counts are based upon the internal revenue laws exclusively, and

no proof has been submitted that the still in question was unregistered, that the distiller's bond in question in count five was not furnished, or that the building in question in count six was not a registered distillery.

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(Title of Court and Cause.)

AFFIDAVIT IN SUPPORT OF APPLICATION FOR ORDER REQUIRING BILL OF PARTICULARS.

STATE OF IDAHO,
COUNTY OF ADA,—SS.

H. GOODFRIEND, JAMES D. AGNEW, SYLVESTER KINNEY, HENRY GRIFFITHS, ED HILL, CARL H. SORENSON, EDITH SORENSON, ED KEMP, and ED WARD, each being first duly sworn, each for himself, deposes and says: That he is one of the defendants named in the above entitled action; that he does not know the facts inquired about in his application for an order requiring the United States Attorney to furnish the defendants and each of them with a bill of particulars, and cannot ascertain said facts from any other source than the United States Attorney for the District of Idaho, who has, as this affiant verily believes, the information asked for, and that unless said United States Attorney furnishes such information requested in said application, this defendant cannot safely go to trial, but is likely to be surprised by evidence for which he is, and will be unprepared.

WHEREFORE, These affiants pray, and each of them prays, that his application for an order requiring

the said United States Attorney to furnish a bill of particulars herein be granted.

H. GOODFRIEND.
JAMES D. AGNEW.
SYLVESTER KINNEY.
H. R. GRIFFITHS.
EDGAR HILL.
CARL H. SORENSON.
EDITH SORENSON.
ED WARD.

Subscribed and sworn to before me this 20th day of February, 1923.

[SEAL] FRANK MARTIN, JR.,
*Notary Public for Idaho,*
Residence: Boise, Idaho.

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(Title of Court and Cause.)

APPLICATION FOR ORDER REQUIRING BILL OF PARTICULARS

COME NOW Defendants H. Goodfriend, James D. Agnew, Sylvester Kinney, Henry Griffiths, Ed Hill, Carl H. Sorenson, Edith Sorenson, Ed Kemp and Ed Ward, and each for himself applies to the Court for an order requiring the United States Attorney for the District of Idaho to furnish him with a bill of particulars with respect to the alleged conspiracy, combination, confederacy and agreement mentioned in Count One of the indictment herein, and therein stated to have been made and entered into between these defendants and the defendant J. H. Evans and other

persons unknown to the Grand Jury, under and by virtue of which these defendants are alleged to have conspired, combined, confederated and agreed together and among themselves and with said other persons, to commit the offense of having and possessing, for beverage purposes, certain intoxicating liquor, commonly known as "moonshine" whiskey; and to inform these defendants when, where, and with whom, these defendants so conspired, combined, confederated and agreed, and the manner and form of such conspiracy, confederation, combination, or agreement, and in what particular manner and method such conspiracy, confederation, combination and agreement was effected, and more particularly as follows:

1. Did all the alleged conspirators join in the conspiracy at its inception?

2. If not, which ones originated the conspiracy, and when, and at what particular place in Boise City, and in what manner, and by what acts, did the conspiracy originate?

3. At what time, and at what particular place, and in what manner, and by what acts, did each of the remaining alleged conspirators join in the conspiracy?

4. That plaintiff be required to state whether the conspiracy arose by virtue of a specific verbal or written agreement among the parties, or whether it arose out of concerted acts of the defendants or some of them.

5. Also as to what particular manner, at what time, and at what particular place, by the law of the United States made unlawful, do they expect to prove the liquor was conspired to be possessed, and if said pos-

session was to be had in Ada County or in Boise City, and at what particular place in Boise City, or in Ada County, is it claimed the liquor was to be possessed?

6. How many meetings, if any, were held by the defendants in forming and carrying out the conspiracy as alleged, and when, and where, was each of said meetings held, and what persons were present at each of said meetings?

The defendants and each of them further petition the Court that by said order the said United States Attorney for the District of Idaho be required in said bill of particulars to state whether the specific overt acts set out in paragraphs numbered one to seven, inclusive, in Count One of the indictment herein, and being contained on pages two to five, inclusive, of the indictment herein, constitute all of the specific overt acts which plaintiff intends to prove as having been done and performed to accomplish the objects and purposes of the conspiracy charged against defendants; and, if not, what other specific overt acts the plaintiff intends to prove in the trial of this cause as having been done and performed by defendants, or either or any of them; and by which of said defendants such other act or acts were performed, and at what particular time and place.

The defendants, and each of them, further petition this Court that by said order the said United States Attorney be required in said bill of particulars to state:

1. Does plaintiff expect to prove that any of the defendants personally sold any intoxicating liquor, and, if so, which of said defendants, and as to each of said

defendants, when, where, and to whom, any such sales were made?

2. Does plaintiff expect to prove that any of the defendants, other than Ed Kemp and Carl and Edith Sorenson, were personally in the possession of any intoxicating liquor, and, if so, which of said defendants, and as to each of such other defendants, when and where did said defendants possess the same?

And that the plaintiff be required further to particularly state the following matters and things, to-wit:

1. Do the specific overt acts set forth in paragraphs numbered 1 to 7 of the first count of said indictment therein alleged to be performed to accomplish the purpose and effect the object of the alleged conspiracy constitute all of the specific overt acts which plaintiff intends or expects to prove as having been performed to accomplish said purpose and effect said object?

2. If not, what other specific overt acts does the plaintiff intend or expect to prove as having been performed by the alleged conspirators, or any of them, and by whom were such other acts performed, and as to each, at what particular time and place and in what particular manner were said acts performed?

3. In what way or manner did the possession of "moonshine whiskey" in the Vernon Hotel, as alleged in paragraph numbered 1 of said count of said indictment, serve to accomplish the purpose or effect the object of the alleged conspiracy?

4. In what way or manner did the furnishing of bail as alleged in paragraph numbered 2 of said first count

of said indictment serve to accomplish the purpose or effect the object of the alleged conspiracy?

5. In what way or manner did the possession of liquor by Ed Kemp, as alleged in paragraph number 3 of said count, serve to accomplish the purpose or effect the object of the alleged conspiracy?

6. In what way or manner did the manufacture of liquor by Ed Kemp, as set forth in paragraph numbered 4 of said count, serve to accomplish the purpose or to effect the object of said alleged conspiracy?

7. In what way or manner did the possession of property designed for the manufacture of liquor, as set forth in paragraph numbered 5 of said count, serve to accomplish the purpose or effect the object of the alleged conspiracy?

8. In what way or in what manner did the furnishing of bail as set forth in paragraph numbered 6 of said count serve to effect the object of and accomplish the purpose of the alleged conspiracy?

9. In what way or in what manner did the execution of a bond as set forth in paragraph numbered 7 of said count serve to accomplish the purpose or effect the object of the alleged conspiracy?

10. Does the plaintiff expect to prove that the alleged conspiracy originated approximately on December 1, 1922, or does the plaintiff expect to prove that it originated at some other time within three years prior to the finding of the indictment herein? If so, what time?

11. If at some other time than approximately De-

cember 1, 1922, at approximately what time did said conspiracy originate?

And that the plaintiff be required particularly to state further as follows:

1. Does the plaintiff expect to prove the existence of three separate and different conspiracies?

2. Does the plaintiff expect to prove one or more than one conspiracy, and if more than one, how many?

*2*

The defendants, each for himself, further petitions the Court and prays that by said order the said United States Attorney for the District of Idaho be required to furnish him information with respect to the alleged conspiracy, combination, confederacy, and agreement, mentioned in Count Two of the indictment herein, and therein stated to have been made and entered into between these defendants and Defendant J. H. Evans, and other persons unknown to the Grand Jury, under and by virtue of which these defendants are alleged to have conspired, combined, confederated and agreed together and among themselves and said other persons to commit the offense wilfully, knowingly, and unlawfully engaging in the business of selling at retail, for beverage purposes, certain intoxicating liquors containing more than one-half of one per cent of alcohol, to-wit: Spirituous liquor commonly known as "moonshine" whiskey; and to inform these defendants when, where, and with whom, these defendants so conspired, combined, confederated and agreed, and the manner and form of such conspiracy, confederation, combination or agreement, and in what particular manner and

method such conspiracy, confederation, combination and agreement was effected, and more particularly as follows:

1. Did all the alleged conspirators join in the conspiracy at its inception?

2. If not, which ones originated the conspiracy, and when, and at what particular place in Boise City, and in what manner, and by what acts did the conspiracy originate?

3. At what time, and at what particular place, and in what manner, and by what acts, did each of the remaining alleged conspirators join in the conspiracy?

4. That plaintiff be required to state whether the conspiracy arose by virtue of a specific verbal or written agreement among the parties, or whether it arose out of concerted acts of the defendants or some of them.

5. Also as to what particular manner, at what time, and at what particular place, by the law of the United States made unlawful, do they expect to prove the liquor was conspired to be possessed, and if said possession was to be had in Ada County or in Boise City, and at what particular place in Boise City, or in Ada County, is it claimed the liquor was to be possessed?

6. How many meetings, if any, were held by the defendants in forming and carrying out the conspiracy as alleged, and when, and where, was each of said meetings held, and what persons were present at each of said meetings?

The defendants and each of them further petition the Court that by said order the said United States Attorney for the District of Idaho be required in said

bill of particulars to state whether the specific overt acts set out in paragraphs numbered one to seven, inclusive, in Count Two of the indictment herein, and being contained on pages six to nine inclusive, of the indictment herein, constitute all of the specific overt acts which plaintiff intends to prove as having been done and performed to accomplish the objects and purposes of the conspiracy charged against defendants; and, if not, what other specific overt acts the plaintiff intends to prove in the trial of this cause as having been done and performed by defendants, or either of them or any of them; and by which said defendants such other act or acts were performed, and at what particular time and place?

The defendants, and each of them, further petition this Court that by said order the said United States Attorney be required in said bill of particulars to state:

1. Does plaintiff expect to prove that any of the defendants personally sold any intoxicating liquor, and, if so, which of said defendants, and, as to each of said defendants, when, where, and to whom, any such sales were made?

2. Does plaintiff expect to prove that any of the defendants, other than Ed Kemp and Carl and Edith Sorenson, were personally in the possession of any intoxicating liquor, and, if so, which of said defendants, and, as to each of such other defendants, when and where did said defendants possess the same?

And that the plaintiff be required further to particularly state the following matters and things, to-wit:

1. Do the specific overt acts set forth in paragraphs

numbered 1 to 7 of the second count of said indictment, therein alleged to be performed to accomplish the purpose and effect the object of the alleged conspiracy, constitute all of the specific overt acts which plaintiff intends or expects to prove as having been performed to accomplish said purpose and effect said object.

2. If not, what other specific overt acts does the plaintiff intend or expect to prove as having been performed by the alleged conspirators, or any of them, and by whom were such other acts performed, and, as to each, at what particular time and place, and in what particular manner were said acts performed.

3. In what way or manner did the possession of "moonshine" whiskey in the Vernon Hotel, as alleged in paragraph numbered 1 of said count of said indictment, serve to accomplish the purpose or effect the object of the alleged conspiracy.

4. In what way or manner did the furnishing of bail, as alleged in paragraph numbered 2 of said second count of said indictment serve to accomplish the purpose or effect the object of the alleged conspiracy?

5. In what way or manner did the possession of liquor by Ed Kemp, as alleged in paragraph numbered 3 of said count, serve to accomplish the purpose and effect the object of the alleged conspiracy?

6. In what way or manner did the manufacture of liquor by Ed Kemp, as set forth in paragraph numbered 4 of said count, serve to accomplish the purpose or to effect the object of said alleged conspiracy?

7. In what way or manner did the possession of

property designed for the manufacture of liquor, as set forth in paragraph numbered 5 of said count, serve to accomplish the purpose or effect the object of the alleged conspiracy?

8. In what way or in what manner did the furnishing of bail, as set forth in paragraph numbered 6 of said count, serve to effect the object or accomplish the purpose of the alleged conspiracy?

9. In what way or in what manner did the execution of a bond, as set forth in paragraph numbered 7 of said count, serve to accomplish the purpose or effect the object of the alleged conspiracy?

10. Does the plaintiff expect to prove that the alleged conspiracy originated approximately on December 1, 1922, or does the plaintiff expect to prove that it originated at some other time within three years prior to the finding of the indictment herein? If so, what time?

11. If at some other time than approximately December 1, 1922, at approximately what time did said conspiracy originate?

And that the plaintiff be required particularly to state further as follows:

1. Does the plaintiff expect to prove the existence of three separate and different conspiracies?

2. Does plaintiff expect to prove one or more than one conspiracy, and, if more than one, how many?

3. Where, and in what particular manner, and at what particular time, and at what particular place, did the alleged conspirators agree and intend to sell liquor at retail?

4. Where, and in what particular manner, and at

what particular time, and at what particular place, did the alleged conspirators agree and intend to sell liquor at wholesale?

5. Did all of the said alleged conspirators intend and agree personally to make sales of liquor, either at wholesale or retail, and, if not, which particular persons among said alleged conspirators were agreed and intended to make such sales at retail or wholesale, respectively?

*3*

The defendants, each for himself, further petition the Court and prays that by said order the United States Attorney for the District of Idaho be required to furnish him information with respect to the alleged conspiracy, confederation, combination and agreement mentioned in Count 3 of the indictment wherein they are stated to have entered into such conspiracy, confederation, combination and agreement with the defendants and certain other persons to the Grand Jury unknown, under and by virtue of which these defendants are alleged to have conspired, combined, confederated and agreed together and among themselves and said other persons to commit the offense of wilfully, knowingly and unlawfully manufacturing for beverage purposes certain spirituous liquor containing more than one-half of one per cent of alcohol, commonly known as "moonshine whiskey"; and to inform these defendants when, where and how many of these defendants so conspired, confederated, combined and agreed, and the manner and form of the combination and agreement, and in what particular manner and method such con-

spiracy, confederation, combination and agreement was effected, and more particularly as follows:

1. Did all the alleged conspirators join in the conspiracy at its inception?

2. If not, which ones originated the conspiracy, and when, and at what particular place in Boise City, and in what manner, and by what acts, did the conspiracy originate?

3. At what time and at what particular place, and in what manner, and by what acts, did each of the remaining alleged conspirators join in the conspiracy?

4. That plaintiff be required to state whether the conspiracy arose by virtue of a specific verbal or written agreement among the parties, or whether it arose out of concerted acts of the defendants or some of them.

5. Also as to what particular manner, at what time, and at what particular place, by the law of the United States made unlawful, do they expect to prove the liquor was conspired to be possessed, and if such possession was to be had in Ada County or in Boise City, and at what particular place in Boise City, or in Ada County, it is claimed the liquor was to be possessed?

6. How many meetings, if any, were held by the defendants in forming and carrying out the conspiracy as alleged, and when, and where, was each of said meetings held, and what persons were present at each of said meetings?

The defendants and each of them further petition the Court that by said order the said United States Attorney for the District of Idaho be required in said bill of particulars to state whether the specific overt acts

set out in paragraphs numbered one to seven, inclusive, in count three of the indictment herein, and being contained on pages ten to thirteen, inclusive, of the indictment herein, constitute all of the specific overt acts which plaintiff intends to prove as having been done and performed to accomplish the objects and purposes of the conspiracy charged against defendants; and, if not, what other specific overt acts the plaintiff intends to prove in the trial of this cause as having been done and performed by defendants, or either or any of them; and by which of said defendants such other act or acts were performed, and at what particular time and place.

The defendants, and each of them, further petition this Court that by said order the said United States Attorney be required in said bill of particulars to state:

1. Does plaintiff expect to prove that any of the defendants personally sold any intoxicating liquor, and, if so, which of said defendants, and as to each of said defendants, when, where, and to whom, any such sales were made?

2. Does plaintiff expect to prove that any of the defendants, other than Ed Kemp and Carl and Edith Sorenson, were personally in the possession of any intoxicating liquor, and, if so, which of said defendants, and as to each of such other defendants, when and where did said defendants possess the same?

And that the plaintiff be required further to particularly state the following matters and things, to-wit:

1. Do the specific overt acts set forth in paragraphs numbered 1 to 7 of the third count of said indictment therein alleged to be performed to accomplish the pur-

pose and effect the object of the alleged conspiracy constitute all of the specific overt acts which plaintiff intends or expects to prove as having been performed to accomplish said purpose and effect said object.?

2. If not, what other specific overt acts does the plaintiff intend or expect to prove as having been performed by the alleged conspirators, or any of them, and by whom were such other acts performed, and as to each, at what particular time and place and in what particular manner were said acts performed.

3. In what way or manner did the possession of "moonshine whiskey" in the Vernon Hotel, as alleged in paragraph numbered 1 of said count of said indictment, serve to accomplish the purpose or effect the object of the alleged conspiracy?

4. In what way or manner did the furnishing of bail as alleged in paragraph numbered 2 of said third count of said indictment serve to accomplish the purpose or effect the object of the alleged conspiracy?

5. In what manner did the possession of liquor by Ed Kemp, as alleged in paragraph number 3 of said count, serve to accomplish the purpose or effect the object of the alleged conspiracy?

6. In what way or manner did the manufacture of liquor by Ed Kemp, as set forth in paragraph numbered 4 of said count, serve to accomplish the purpose or to effect the object of said alleged conspiracy?

7. In what way or manner did the possession of property designed for the manufacture of liquor, as set forth in paragraph numbered 5 of said count, serve to

accomplish the purpose or effect the object of the alleged conspiracy?

8. In what way or in what manner did the furnishing of bail as set forth in paragraph numbered 6 of said count, serve to effect the object or accomplish the purpose of the alleged conspiracy?

9. In what way or in what manner did the execution of a bond as set forth in paragraph numbered 7 of said count serve to accomplish the purpose or effect the object of the alleged conspiracy?

10. Does the plaintiff expect to prove that the alleged conspiracy originated approximately on December 1, 1922, or does the plaintiff expect to prove that it originated at some other time within three years prior to the finding of the indictment herein? If so, what time?

11. If at some other time than approximately December 1, 1922, at approximately what time did said conspiracy originate?

And that the plaintiff be required particularly to state further as follows:

1. Does the plaintiff expect to prove the existence of three separate and different conspiracies?

2. Does plaintiff expect to prove one or more than one conspiracy, and if more than one, how many?

4

And that the plaintiff be required particularly to state further the following matters and things concerning count 4 of the indictment, to-wit:

Whether the still and accessories therein described and referred to are the same still and accessories described in paragraph 5 in said counts 1, 2 and 3, respectively, of said indictment.

*5*

And that the plaintiff be further required to particularly state as to count 5 of said indictment, the following matters and things, to-wit:

Whether the business of distillation in count 5 set out and referred to was the same act or acts of distillation referred to in paragraph numbered 4 in counts 1, 2 and 3, respectively, of said indictment.

*6*

And that the plaintiff be required particularly to state concerning count six of said indictment, the following matters and things, to-wit:

Whether the mash referred to in count 6 of said indictment is the same mash referred to and described in paragraph numbered 5 of counts 1, 2 and 3, respectively, of said indictment.

And the defendants above named and each and every of them respectfully request the Court to set a time when this application may be heard and cause notice of such hearing to be served upon the United States Attorney for the District of Idaho.

J. R. SMEAD,
*Attorney for Defendant H. Goodfriend.*
HAWLEY & HAWLEY,
*Attorney for Defendant James D. Agnew.*
CLAUDE W. GIBSON,
*Attorney for Defendant Sylvester Kinney.*
P. E. CAVANEY,
*Attorney for Defendant Henry Griffiths.*
FRANK MARTIN,
*Attorney for Defendant Ed Hill.*

W. H. LANGROISE,
*Attorney for Defendants Carl H. Sorenson and Edith Sorenson.*

.....

*Attorney for Defendant Ed Kemp.*
WM. HEALY,
*Attorney for Defendant Ed Ward.*

Dated: Boise, Idaho, February 20, 1923.

The foregoing motion, supported by the foregoing affidavit, having been made and submitted to the Court, was thereafter and prior to the trial of this cause refused, to which refusal defendants excepted.

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(Title of Court and Cause.)

ORDER SETTLING BILL OF EXCEPTIONS

It is hereby ordered that the Bill of Exceptions, consisting of pages from 1 to 465, inclusive, heretofore lodged, as now amended by agreement of the above named parties, be settled and allowed as the Bill of Exceptions for use in the proceedings to be had herein pursuant to the writ of error heretofore issued.

June 19, 1923.

FRANK S. DIETRICH,
*Judge.*

Service acknowledged April 16, 1923.
E. G. Davis, U. S. District Attorney.

Endorsed.
Lodged April 16, 1923.
Filed June 19th, 1923.
W. D. McReynolds, Clerk.
By Pearl E. Zanger, Deputy.

(Title of Court and Cause.)

No. 935

PETITION FOR WRIT OF ERROR

COME NOW the defendants H. Goodfriend, James D. Agnew, Sylvester Kinney, Carl Sorenson and Ed Ward, and complain and say that on or about the 9th day of April, 1923, this Court entered judgment and sentence herein against these defendants severally, in which judgment and in the proceedings had prior thereto certain errors were committed to the prejudice of these defendants and of each of them, all of which appear from the assignments of error which is filed with this petition.

WHEREFORE, These defendants, and each of them, pray that a Writ of Error may issue in their behalf out of this Court or out of the United States Circuit Court of Appeals for the Ninth Circuit for the correction of errors so complained of, and that a transcript of the record proceedings and papers in this cause, duly authenticated, may be sent to the Circuit Court of Appeals of the Ninth Circuit.

J. R. SMEAD,
*Attorney for H. Goodfriend.*
HAWLEY & HAWLEY,
*Attorney for James D. Agnew.*
CLAUDE W. GIBSON,
*Attorney for Sylvester Kinney.*
W. H. LANGROISE,
*Attorney for Carl Sorenson.*
WM. HEALY,
*Attorney for Ed Ward.*

Service acknowledged this 18th day of April, 1923.
John H. McEvers, Assistant U. S. Attorney.

Endorsed. Filed April 18, 1923.
W. D. McReynolds, Clerk.
By Pearl E. Zanger, Deputy.

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(Title of Court and Cause.)
No. 935
ASSIGNMENTS OF ERROR

NOW COME The defendants H. Goodfriend, James D. Agnew, Sylvester Kinney, Carl Sorenson and Ed Ward, and severally, in connection with the petition for a writ of error herein, make the following assignment of errors, which are alleged to have occurred in the proceedings had in the above entitled cause, to-wit:

1. The Court erred in denying the motion for a bill of particulars made and heard prior to the trial of said cause.

2. The Court erred in denying defendant's motion that the plaintiff be required to elect between the charges of conspiracy and indictment and the charges under certain internal revenue laws, which motion was made at the beginning of the trial and renewed at the close thereof, and on each occasion was denied.

3. The Court erred in refusing the defendants leave to withdraw temporarily their pleas of not guilty in order to make a motion to quash the indictment, at the beginning of the trial.

4. The Court erred in permitting the witness, Mrs. W. H. Coppedge, to testify to transactions or consultations with the defendant Goodfriend concerning de-

fendant Agnew in the summer of 1922, at a time prior to the period covered by the alleged conspiracy, concerning the alleged enmity then existing between said defendants in the matter of the sheriff's deputies and transactions involving intoxicating liquor.

5. The Court erred in permitting the witness, Harry Goodenough, to testify to the purchase of intoxicating liquor from Henrietta Goldsberry at the Union Rooms on or about December 17, 1922.

6. The Court erred in permitting the witness Goodenough to testify to his conversations with Prosecuting Attorney Delana and Deputy Sheriff Robinson concerning his alleged purchase of liquor at the Union Rooms.

7. The Court erred in permitting the witness George W. Gravin to testify concerning the purchase of liquor from Henrietta Goldsberry about December 17, 1922, at the Union Rooms.

8. The Court erred in sustaining the plaintiff's objection to the following question, asked the witness Gravin in connection with his alleged statement to the prosecuting attorney and deputy sheriff about obtaining whiskey at the Union Rooms: Q. And you didn't tell them at that time that you had gotten whiskey the day before at a time much earlier than you claimed to have gone to the Union Rooming House, did you?

9. The Court erred in permitting Prosecuting Attorney Delana to testify to his alleged conversation with the witness Gravin and Goodenough in the sheriff's office on December 18, 1922.

10. The Court erred in permitting evidence to be

given concerning what was seen and heard by Prohibition Officers Steunenberg, Waggoner, Reynolds and Nickerson in a search of the private apartment of defendant Carl Sorenson and wife on January 10, 1923, at the Vernon Hotel, and in permitting the plaintiff to put in evidence the property seized in that apartment at that time, and to put in evidence through said agents the information which they obtained in the course of such search and seizure, to-wit: evidence concerning arrangement of said hotel, the presence of a buzzer in Room 2 thereof, its connection with the outside front door of said hotel, the fact of the search of Rooms 2, 3 and 4 by said officers, the placing in evidence of 1 gallon jug, 1 agate iron pitcher, 1 towel, two small pitchers, a tray, 2 small bottles containing intoxicating liquor, 2 small glasses, some corks, and about two quarts of intoxicating liquor contained in said glass jug, testimony of said officers concerning the presence of empty bottles in the kitchen in said apartment, and testimony concerning statements of Mrs. Sorenson, wife of defendant, that the said liquor seized was all she had.

11. The Court erred in denying the motion to strike out all of the testimony of the witness Steunenberg concerning the matters set forth in assignment No. 10, and in refusing Defendant Sorenson's demand for the return of the property therein mentioned.

12. The Court erred in overruling objection to the testimony of the witness Nickerson concerning the same matters set out in Assignment No. 10.

13. The Court erred in denying defendant's objection to the testimony of the witness Reynolds concerning the matters set out in Assignment No. 10.

14. The Court erred in denying the defendant's objection to the testimony of the witness Waggoner concerning the matters set out in Assignment No. 10.

15. The Court erred in refusing and denying the petition of the defendant Carl Sorenson and his wife, Edith Sorenson, to have the search of the Vernon Hotel declared illegal and to obtain the return of the property seized in the course of said search.

16. The Court erred in overruling defendant's objection to the testimony of the witness McCutcheon concerning the commencement of an abatement action against the Vernon Hotel, Carl Sorenson and Edith Sorenson.

17. The Court erred in admitting in evidence over defendant's objection Exhibits 15 and 16, being copies of printed periodicals issued under dates of March 16, 1922, and March 23, 1922, and each bearing mailing address to Defendant Goodfriend, and alleged to have been found in the house on the Evans ranch at the time of the arrest of Defendant Kemp and seizure of a distilling apparatus in said house.

18. The Court erred in sustaining plaintiff's objections to questions asked the witness Paul Reynolds by defendant's counsel as to whether the copy of the search warrant served on Ed Kemp at the time of his arrest and the raid of the distilling apparatus at the Evans ranch, and as to whether the affidavit made to procure the issuance of such search warrant, correctly stated the information and reasons which led to the procuring of the search warrant and the making of the search.

19. The Court erred in sustaining plaintiff's objec-

tion to the offer of a document marked Exhibit 34, same being the affidavit for search warrant referred to in Assignment No. 18, and showing what information and reasons led up to the search of the Evans' place and the arrest of the Defendant Kemp.

20. The Court erred in admitting in evidence over defendants' objection Government's Exhibit 23, same being a list of telephone numbers of various persons and places, which have already been testified to by the Government witness Atkinson.

21. The Court erred in permitting the witness Robin Reynolds to explain and demonstrate before the jury, over defendants' objection, a certain alleged detectograph apparatus and its operation and use.

22. The Court erred in sustaining plaintiff's objection to the following question put to the witness Robin Reynolds on the part of defendants in connection with his testimony concerning the particular detectograph apparatus exhibited in Court: Q. Haven't you heretofore stated about this particular instrument that if you had occasion to use this instrument again you would want to send away and get a different form of transmitter?

23. The Court erred in permitting the witness Robin Reynolds, over defendant's objection, to set up and demonstrate the detectograph apparatus in response to the direction of the United States Attorney that he set the same up as it was in the rooms of Mr. and Mrs. Curtis.

24. The Court erred in permitting the witness Marie Curtis to testify concerning a conversation between

Defendant Goodfriend and Defendant Griffith about Defendant Ed Hill in connection with a place referred to as Jap's place, and in denying defendant's motion to strike out the testimony of the conversation concerning said Hill and Jap's place on the ground that the same was highly prejudicial to the defendant Goodfriend.

25. The Court erred in permitting, over defendants' repeated objections, Witness Marie Curtis to testify from her notes, in view of her statements that she had no independent recollections of the matters testified to, that she could answer no questions except by reference to her notes, that she selected from conversations claimed to have been heard what she concluded had a bearing on this cause, that she did not, after consulting her notes, have any independent memory of what she claimed to have heard and written down, and that she was compelled to consult her notes in answering all questions.

26. The Court erred in permitting the witness Marie Curtis to testify to a conversation between the defendant Goodfriend and a man unknown to the witness concerning the defendant's telephone line, on or about February 8, 1923.

27. The Court erred in holding that it was immaterial whether or not the witness' husband was discharged by the manager of the Mutual Building & Loan Company, which he is alleged to have represented while witness and her husband were in Boise, that inquiry as to whether the witness' husband was singing for the Ku Klux lecturer during the period covered by the

testimony was incompetent and in refusing to permit an offer of proof in connection with said inquiries, and in holding incompetent an inquiry as to whether witness' husband was a member of the Ku Klux Klan; in holding that it was immaterial whether the opponent of Defendant Agnew in the contest for nomination for sheriff, in which contest Defendant Goodfriend was also active, was indorsed by and the candidate of the Ku Klux Klan; and in sustaining objection to the inquiry by defendants of the witness Marie Curtis as to whether or not she had in December, 1922, engaged in a quarrel with the defendant Goodfriend on the subject of the Ku Klux Klan.

28. The Court erred in denying defendant's motion to strike out the testimony of the witness Marie Curtis in regard to conversations of said defendants prior to December 29, on the ground that her own evidence showed that her alleged recollections were not of the conversations but recollections of notes which she claimed to have made a considerable time after said conversations and which notes she claimed to have studied preparatory to giving her testimony in this cause.

29. The Court erred in refusing to permit the witness Marie Curtis to answer whether she had an independent recollection as to how long after each conversation testified to by her, she prepared her notes which she used on the witness stand, other than her statement that it was her custom to write the conversations down shortly after the conversations occurred.

30. The Court erred in permitting the witness Kuchkenbacker to use and testify from his notes over defendant's objections, in view of his own statement that he could remember no conversations or occurrences independently of his notes, and could testify to nothing except as it appeared in his notes, and that his original notes had been destroyed and the ones used by him written up some time after the occurrences, and enlarged upon when so written.

31. The Court erred in permitting the witnesses Curtis and Kuchkenbacker to read from their notes as part of their testimony from the witness stand over the objection of defendants.

32. The Court erred in permitting the witness Kuchkenbacker to testify to an alleged conversation between the defendant Goodfriend and the defendant Griffith concerning Defendant Hill in connection with a place referred to as Jap's place, and further in regard to one Briggs, an officer on the police force, and further whether there were any stool pigeons at work, and further that Defendant Agnew was after the White House and would freeze them out, all said matters and things having no material relation to the charge herein, and being prejudicial to Defendant Goodfriend.

33. The Court erred in permitting the witness Kuchkenbacker to testify concerning an alleged conversation between Defendant Goodfriend and a man unknown to the witness about making $3,000 next month, going to the World's Fair in two years, and concerning parties named Gill and George, and as to where Defendant Goodfriend thought Gill's "cache" was, and that Good-

friend could furnish protection to the White House as far as cards were concerned.

34. The Court erred in permitting the witness Kuchkenbacker to testify concerning deposits made in the Boise City National Bank for Goodfriend by some other man unknown to the witness, the matter not at any time being connected with the issues of this cause.

35. The Court erred in denying defendant's motion to strike out the direct testimony of the witness Kuchkenbacker on the ground that he had conferred with the witness Marie Curtis after the conclusion of her testimony and before taking the witness stand himself, in violation of the Court's order excluding witnesses from the court-room while testimony was being given.

36. The Court erred in permitting the witness Paul Reynolds to testify from his notes, in view of his testimony that his original notes taken at the time of his hearing alleged conversations by certain of the defendants were twice rewritten and enlarged upon in the notes used on the witness stand, and his original notes, being notes of all that he could hear, were destroyed.

37. The Court erred in permitting the witness Paul Reynolds to read his notes on the witness-stand over the objection of defendants.

38. The Court erred in sustaining the plaintiff's objection to the defense's question put to the witness Paul Reynolds, as follows: Q. Now Mr. Reynolds, had you had anything that you took to be information concerning any whiskey at the Vernon Hotel prior to hearing that conversation (conversation between De-

fendants Goodfriend and Mrs. Sorenson in Goodfriend's office) you have told about?

39. The Court erred in sustaining the plaintiff's objection to defense's question as to whether the search at the Vernon Hotel was brought about by the conversation that witness Paul Reynolds claimed to have heard in Defendant Goodfriend's office.

40. The Court erred in sustaining the plaintiff's objection to defendant's question of the witness Paul Reynolds as to whether he had any other information relied upon in obtaining the search warrant for the Vernon Hotel than what he had gotten through the conversation overheard in Defendant Goodfriend's office.

41. The Court erred in permitting the witness Ada Taylor to read her notes to the jury.

42. The Court erred in denying defendant's motion to strike out the testimony of the witness Harry Briggs, in view of the fact that it was in no way connected as competent evidence on the issues of this cause.

43. The Court erred in permitting plaintiff to inquire on cross-examination of Defendant Griffith concerning the acts and reputation of the defendant Goodfriend in the matter of gambling and playing cards.

44. The Court erred in sustaining objections to the questions of defendants put to the witness Earnest A. Stoops as to whether he had received any orders from Chief of Police Griffith to protect any rooming houses in Boise, and in sustaining objection to similar questions as to whether the chief of police had given instructions not to enforce the liquor laws, and in refusing

defendants an opportunity to make an offer of proof as to the propriety and competency of the evidence sought to be adduced by such questions.

45. The Court erred in sustaining plaintiff's objections to defendant's offer of the original affidavit filed before Commissioner Jackson to procure the search warrant which was used to search the J. H. Evans place at the time of the arrest of Defendant Kemp, which affidavit was marked for identification Exhibit 34.

46. The Court erred in denying the motion that the charge against Defendant Ed Ward be dismissed on the grounds of insufficient evidence.

47. The Court erred in instructing the jury that they might find the defendants and each of them guilty upon Counts 4, 5 and 6 of the indictment, for the reason that in each instance the evidence was insufficient to warrant such finding, in this, that there had been no proof of any sort that the still referred to in said indictment was not registered, that the distiller's bond referred to was not furnished, and that the building referred to as the distillery was not registered according to law.

48. The verdict of the jury herein is contrary to the evidence, as follows:

First, there is no proof as to Count 6 of the indictment that the building therein mentioned was not duly authorized for use as a distillery.

Second. There is no proof as to Count 5 that the distiller's bond therein mentioned was not furnished.

Third. There is no proof as to Count 4 that the still therein mentioned was not registered according to law.

Fourth. The evidence in the case did not warrant

a finding that three different conspiracies existed among the defendants as set out in Counts 1, 2 and 3 of said indictment.

49. The verdict herein is contrary to law, for the reasons set out in Assignment No. 48.

The judgment herein is unlawful, for the reason that it is based upon a verdict unlawful and unsupported by the evidence in the particulars set out in the two specifications last stated.

WHEREFORE, The plaintiffs in error pray that the judgment herein be reversed.

J. R. SMEAD,
*Attorney for H. Goodfriend.*
HAWLEY & HAWLEY,
*Attorney for James D. Agnew.*
CLAUDE W. GIBSON,
*Attorney for Sylvester Kinney.*
W. H. LANGROISE,
*Attorney for Carl Sorenson.*
WM. HEALEY,
*Attorney for Ed Ward.*

Service acknowledged this 18th day of April, 1923.
John H. McEvers, Assistant U. S. Attorney.
Endorsed. Filed April 18, 1923.
W. D. McReynolds, Clerk.
By Pearl E. Zanger, Deputy.

(Title of Court and Cause.)

No. 935

ORDER GRANTING WRIT OF ERROR
CRIMINAL

On petition of defendants above named, it is hereby ordered that a writ of error directed to the judgment heretofore rendered and entered herein, be, and the same is hereby granted and allowed, and that a certified transcript of the record, testimony, necessary exhibits and all proceedings be forthwith transmitted to the Clerk of the Circuit Court of Appeals of the United States for the Ninth Circuit.

It is further ordered that the defendants be, and they are hereby, admitted to bail respectively in the following sums, pending the termination of said proceedings in error, conditioned according to law, to-wit: H. Goodfriend, in the sum of $5,000; James D. Agnew, in the sum of $2,500; Sylvester Kinney, in the sum of $1,500; Carl Sorenson, in the sum of $1,500, and Ed Ward, in the sum of $1,500.

Dated this 18th day of April, 1923.

FRANK S. DIETRICH,
*United States District Judge for the District of Idaho.*

Endorsed. Filed April 18, 1923.
W. D. McReynolds, Clerk.
By Pearl E. Zanger, Deputy.

(Title of Court and Cause.)

No. 935

BOND

WHEREAS, On the 9th day of April, 1923, a judgment of conviction was rendered against H. Goodfriend, defendant above named, in the above entitled Court and cause;

And Whereas, said defendant has procured a writ of error to issue in said cause, directed to said Court, for the purpose of procuring said judgment and the proceedings leading thereto to be reviewed in the Circuit Court of Appeals for the Ninth Circuit of the United States of America;

And Whereas, defendant has been admitted to bail and said bail fixed at $5,000.00 pending the hearing and decision of said Circuit Court of Appeals in said writ of error;

Now, Therefore, the undersigned, H. Goodfriend, principal, and C. A. Johnson and Charles Hillock, sureties, do hereby acknowledge themselves well and truly bound unto the United States of America in the penal sum of Five Thousand ($5,000) Dollars;

The condition of this recognizance is such, that if the said H. Goodfriend shall diligently prosecute the proceedings herein pursuant to said writ of error, and if, in the event said judgment conviction is affirmed and made final, he shall appear in the above entitled Court and deliver and render himself for execution of said judgment at such time and place as may by said Court

be ordered and directed, then these presents shall be void, otherwise they shall be in full force and effect.

H. GOODFRIEND,
*Principal.*
C. A. JOHNSON,
*Surety.*
CHAS. HILLOCK,
*Surety.*

STATE OF IDAHO,
COUNTY OF ADA,—SS.

C. A. JOHNSON, being first duly sworn, deposes and says that he is one of the sureties in the foregoing recognizance, that he is worth the sum of $10,000.00 over and above his just debts and exemptions, and that his property consists of the following: Real Estate in Boise City and business interests also, worth at least the said amount.

And CHAS. HILLOCK, a surety in the foregoing recognizance, being first duly sworn, deposes and says that he is worth the sum of $7,500.00 over and above his just debts and exemptions, and that his property consists of the following: Real estate and other interests in Ada County, Idaho.

C. A. JOHNSON.
CHAS. HILLOCK.

Subscribed and sworn to before me this 16th day of April, 1923.

[SEAL]

E. G. ELLIOTT,
*Notary Public for Idaho,*
Residence: Boise, Idaho.

Approved.
DIETRICH,
*Judge.*
April 23, 1923.

Endorsed. Filed April 23, 1923.
W. D. McReynolds, Clerk.

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(Title of Court and Cause.)
No. 925
PRAECIPE

*To the Clerk of the Above Named Court*

Please include in the record for the Circuit Court of Appeals for the Ninth Circuit in the proceedings in error in the above entitled cause, the following, to-wit:

Indictment.

Arraignment and Pleas of defendants.

Stipulation embodying certain portions of the record in United States versus Edith Sorenson and Carl Sorenson as a part of the record in the above entitled cause.

The following stipulated to be taken from United States versus Sorenson et al and made a part of the record herein, to-wit:

Petition for return of certain property taken on search warrant, and exhibits attached thereto.

Order to show cause and return of service thereon.

Affidavits filed in support of said petition.

Demurrer to said petition and supporting affidavits.

Decision of Court on hearing of said demurrer to petition and affidavits.

Verdict and Minute Entry allowing exceptions thereto, judgment of Court on verdict.

Bill of Exception and acknowledgment of service indorsed thereon.

Order settling Bill of Exceptions.

Minute entry of order for time to lodge Bill of Exceptions, and Petition for Writ of Error.

Order filed extending time to lodge Bill of Exceptions to April 16, 1923.

Petition for Writ of Error, Assignments of Error.

Order allowing Writ of Error.

Writ of Error.

Citation.

Order fixing time to file record in Circuit Court of Appeals.

Bonds of Plaintiffs in Error, on appeal.

This Praecipe.

Clerk's return to Writ of Error.

Clerk's Certificate.

HAWLEY & HAWLEY,
WM. HEALY,
W. H. LANGROISE,
CLAUDE W. GIBSON,
J. R. SMEAD,
*Attorneys for Defendants.*

Endorsed. Filed June 26, 1923.
W. D. McReynolds, Clerk.
By Pearl E. Zanger, Deputy.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 935

WRIT OF ERROR

UNITED STATES OF AMERICA,

*Defendant in Error,*

vs.

H. GOODFRIEND, JAMES D. AGNEW, SYLVESTER KINNEY, CARL H. SORENSON and ED WARD,

*Plaintiffs in Error.*

UNITED STATES OF AMERICA,
NINTH JUDICIAL DISTRICT,—SS.

*The President of the United States to the Honorable Judge of the District Court of the United States for the District of Idaho,* GREETING:

Because in record and proceedings, as also in the rendition of the judgment, of a plea which is in the said District Court, before you, between the United States of America and H. Goodfriend, James D. Agnew, Sylvester Kinney, Carl H. Sorenson and Ed Ward, defendants, a manifest error hath happened to the great damage of the said defendants, as by their complaint appears, we being willing that error, if any has been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court

of Appeals for the Ninth Circuit, together with this writ, so that you have the same at the City of San Francisco in said Circuit on the 18th day of May next, in the said Circuit Court of Appeals, to be then and there held, that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable William Howard Taft, Chief Justice of the United States, this 18th day of April, A. D. 1923, in the one hundred forty-eighth year of the independence of the United States of America.

Allowed by Honorable Frank S. Dietrich, United States District Judge.

ATTEST: W. D. McREYNOLDS,
*Clerk of the United States District Court for the District of Idaho.*

Service acknowledged and a copy received this 18th day of April, 1923.

JOHN H. McEVERS,
*Assistant United States Attorney.*

Endorsed. Filed April 18, 1923.
W. D. McReynolds, Clerk.
By Pearl E. Zanger, Deputy.

No. 935

CITATION

IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE DISTRICT OF IDAHO, SOUTHERN DIVISION.

UNITED STATES OF AMERICA,

*Plaintiff,*

vs.

H. GOODFRIEND, JAMES D. AGNEW, SYLVESTER KINNEY, CARL H. SORENSON and ED WARD,

*Defendants.*

*The President of the United States to the above named Plaintiff, and to the United States Attorney for the District of Idaho:*

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit to be held in the City of San Francisco in the State of California within 30 days from the date of this citation, pursuant to a writ of error filed in the Clerk's office of the United States District Court for the District of Idaho, Southern Division, in the above entitled cause, to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected and speedy justice should not be done the parties in that behalf.

Witness the Honorable William Howard Taft, Chief Justice of the Supreme Court of the United States, this 23rd day of June, A. D. 1923, and of the Independence

of the United States the One Hundred and Forty-sixth.

FRANK S. DIETRICH,
*Judge.*

Service of the within Citation is hereby acknowledged this 23rd day of June, 1923.

JOHN H. McEVERS,
*Asst. United States Attorney for the District of Idaho.*

Endorsed. Filed June 26, 1923.
W. D. McReynolds, Clerk.
By Pearl E. Zanger, Deputy.

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RETURN TO WRIT OF ERROR

And thereupon it is ordered by the Court that the foregoing transcript of the record and proceedings in the cause aforesaid, together with all things thereunto relating, be transmitted to the said United States Circuit Court of Appeals for the Ninth Circuit, and the same is transmitted accordingly.

[SEAL] W. D. McREYNOLDS,
*Clerk.*

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(Title of Court and Cause.)

CLERK'S CERTIFICATE

I, W. D. McREYNOLDS, Clerk of the District Court of the United States for the District of Idaho, do hereby certify the foregoing transcript of pages numbered from 1 to 490, inclusive, to be full, true and correct copies of the pleadings and proceedings in the above entitled cause, and that the same together constitute the tran-

script of the record herein upon Writ of Error to the United States Circuit Court of Appeals for the Ninth Circuit, as requested by the praecipe filed herein.

I further certify that the cost of the record herein amounts to the sum of $565.75, and that the same has been paid by the Plaintiffs in Error.

Witness my hand and the seal of said Court this 13th day of July, 1923.

[SEAL] W. D. McREYNOLDS,
*Clerk.*